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## PAUL BREST'S BRIEF FOR AN IMPERIAL JUDICIARY

RAOUL BERGER\*

"he who thinks the old embankments useless and destroys them, is sure to suffer from the desolation caused by overflowing water."

Confucius\*\*

Professor Paul Brest's article "The Misconceived Quest for the Original Understanding"<sup>1</sup> might better have been entitled "The Constitution is Dead." For after an exhaustive, Linnean-type classification of interpretive approaches — originalism, non-originalism, textualism, intentionalism, strict intentionalism, moderate intentionalism, etc., etc. — he sweeps all aside and mounts a challenge to the assumption "that judges and other public officials were bound by the text or original understanding of the Constitution."<sup>2</sup> That judges are sworn "to support this Constitution" is of no moment. Richard Nixon, thou art vindicated.<sup>3</sup>

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\*\* W. DURANT, *OUR ORIENTAL HERITAGE* 673 (16th ed. 1954); *Mapp v. Ohio*, 367 U.S. 643, 659 (1961): "nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its existence."

1. Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980) [hereinafter cited as Brest].

2. *Id.* at 224.

3. Madison stated in the Convention "1. the collective interest & security were much more in the power belonging to the Executive than to the Judiciary department. 2. in the administration of the former much greater latitude is left to opinion and discretion than in the administration of the latter." 2 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 34 (1911). Nixon might therefore assert greater freedom than Warren.

The lesson of the Warren Court was not lost on the Nixon administration. Donald E. Santarelli, an Associate Deputy Attorney General, who described himself in April, 1973, as in charge of "an idea shop" which "work[s] on concepts" and "plans" for the President, stated that the Constitution "is what you can interpret it to mean in the light of modern needs . . . [W]e are using the [constitutional] issues for the self-serving purpose of striking a new balance of power. . . . Today the whole Constitution is up for grabs." *THE NEW YORKER*, April 28, 1973, at 32-34.

*The Constitution is Binding*

Faced by the fact that the Court is imposing its own values on the people,<sup>4</sup> often in defiance of the framers' intentions, Brest grasps the nettle: "What authority," he asks, "does the written Constitution have in our system of constitutional government?" And he answers that "the authority of the Constitution derives from the consent of its adopters." But "their consent cannot bind succeeding generations. We did not adopt the Constitution, and those who did are dead and gone,"<sup>5</sup> the old refrain — "The Founding Fathers cannot rule us from their graves."<sup>6</sup> Since the judiciary itself is a creature of the Constitution, what becomes of judicial authority?<sup>7</sup> Like the Pope, the Court has no battalions. What prevents us from "thrust[ing] aside the dead hand of Earl Warren,"<sup>8</sup> an act Brest regards as impious.<sup>9</sup>

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4. "Why should not the Court acknowledge that the source of newly-invented rights is not the Constitution but the enhanced seriousness of certain values in our society?" White, *Reflections on the role of the Supreme Court: the contemporary debate and the 'lessons' of history*, 63 JUDICATURE 162, 168 (1979). See also Forrester, *Are We Ready for Truth in Judging?*, 63 A.B.A.J. 1212, 1215 (1977). See also Robert Cover at note 75 *infra*.

5. Brest, *supra* note 1, at 225. That analysis could prove counterproductive. The Northern workingman who has logged twenty years of seniority may justly complain, when bumped to make way for a newly-employed black, so that past injustices to blacks may be redressed, that he is not bound by the sins of his dead forbears, the less since the North did not participate in the misdeeds of the Southern slavocracy. "Punishing people for their parents' transgressions is outlawed as a substantively unfair outcome . . ." J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 92 (1980) [hereinafter cited as ELY].

"It might be thought," Brest states, "that judges and other officials have expressly consented to be bound by the Constitution by virtue of their oath of office 'to support this Constitution'. . . Cf. *Eakin v. Raub*, 12 S.&R. 330, 352-53 (Pa. 1825) (the oath 'is designed rather as a test of the political principles of the man, than to bind the officer in the discharge of his duty')." Brest, *supra* note 1, at 225 n.80. Judge Gibson added that "otherwise, it were difficult to determine, what operation it is to have in the case of a recorder of deeds, for instance, who, in the execution of his office, has nothing to do with the Constitution." But Gibson went on to say, "the oath was more probably designed to secure the powers of each of the different branches from being usurped by any of the rest; for instance, to prevent . . . the supreme court from attempting to control the legislature." *Id.* *Eakin* is a strange citation for untethered judicial discretion, for Gibson's famous dissent rejected judicial review altogether.

6. Miller, *Book Review*, Washington Post, Nov. 13, 1977, § E, at 4, col. 1, § E, at 8, col. 1.

7. The Massachusetts House wrote to the Earl of Shelburne in 1768 that "the Constitution is fixed; it is from thence, that the legislature derives its authority; therefore it cannot change the constitution without destroying its own foundation." H. COMMAGER, *DOCUMENTS OF AMERICAN HISTORY* 65 (7th ed. 1963). Madison stated in the Federal Convention that "it would be a novel & dangerous doctrine that a Legislature could change the Constitution under which it held its existence." 2 M. FARRAND, *RECORDS OF THE FEDERAL CONVENTION OF 1787* at 92-93 (1911). For similar remarks, see 2 WRITINGS OF SAMUEL ADAMS 325 (H. Cushing ed. 1906); G. WOODS, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* at 277 (1969).

8. Sobran, *Taking the Fourteenth*, 30 NAT'L REV. 283, 284 (1978).

9. See text accompanying note 195 *infra*.

For Brest, the "authority of the American Constitution" is "questionable."<sup>10</sup> But by his own testimony it has yet to be questioned by the American people: "the written Constitution lies at the core of the American 'civil religion.' Not only judges and other public officials, but the citizenry at large habitually invoke the Constitution. . . ."<sup>11</sup> He notes "the felt need to justify decisions by invoking the authority of the Constitution,"<sup>12</sup> without which the people would not swallow busing, affirmative action, anti-death penalty and pornography decrees. He acknowledges that the "Constitution remains the governing document of the United States. It establishes the national government, its branches and offices. . . ."<sup>13</sup> From Brest's own recitals it therefore appears that the people "consent" to the Constitution as "the governing document of the United States." His demand for recurrent expressions of "consent" would reduce us to a nation of schoolboys who mechanically pledge allegiance to the flag every morning, contrary to the rule that an enactment remains in force until superseded or repealed.<sup>14</sup>

Of course the dead cannot bind us; nor did they seek to do so. Instead, the Framers provided us with an instrument of change — amendment pursuant to article V. "The real issue," as Professor Willard Hurst perceived in 1954, "is who makes the policy choices in the twentieth century: judges or the combination of legislature and electorate that makes constitutional amendments."<sup>15</sup>

The Founders' postulates were summarized by Professor Philip Kurland:

The concept of the written constitution is that it defines the authority of government and its limits, that government is the

10. Brest, *supra* note 1, at 225.

11. *Id.* at 234.

12. *Id.* at 235.

13. *Id.* at 236.

14. Judge Learned Hand stated that the judge "has no right to divination of public opinion which runs counter to its last formal expression." L. HAND, *THE SPIRIT OF LIBERTY* 14 (1952).

Reiterated "consent" is not, however, essential to the "binding" effect of judicial decisions. Here Brest holds that for the "nonoriginalist," who "purposely departs from the text and original understanding; the very endurance of deviant doctrine is evidence that it reflects contemporary norms and hence becomes an independent basis for its legitimacy." Brest, *supra* note 1, at 232 n.108. Why does not the "enduring" attachment of the people to their "civil religion," the Constitution, equally attest that "it reflects contemporary norms?" Resistance to busing, abortion, death penalty decrees testify that the Court's "deviant doctrine" does not "reflect contemporary norms."

15. Hurst, *Discussion on The Process of Constitutional Construction* in *SUPREME COURT & SUPREME LAW* 75 (E. Cahn ed. 1954). "The issue," Professor Gary Leedes concluded, is "Who should decide." Leedes, *The Supreme Court Mess*, 57 *TEX. L. REV.* 1361, 1444 (1979). Even more basic is the question, where was the power to make ultimate policy decisions conferred on the Court? See text accompanying notes 126–138 *infra*.

creature of the constitution and cannot do what it does not authorize . . . . *A priori*, such a constitution could only have a fixed and unchanging meaning, if it were to fulfill its function. For changed conditions, the instrument itself made provision for amendment which, in accordance with the concept of a written constitution, was expected to be the only form of change . . . .<sup>16</sup> So much was adumbrated by Chief Justice Marshall in *Marbury v. Madison*, which Brest regards as "establishing" judicial review:

The powers of the legislature [and the courts] are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?<sup>17</sup>

Marshall added that the Framers contemplated the Constitution "as a rule for the government of *courts*, as well as of the legislature."<sup>18</sup> Brest notes that the leading Reconstruction authority on constitutional law, Chief Justice Thomas Cooley, considered that "the meaning of the constitution is fixed when it is adopted, and it is not different at any time when a court has occasion to pass upon it,"<sup>19</sup> and that the Court reiterated this view in 1895.<sup>20</sup> The new-born activist doctrine that the Constitution is no longer binding, that it is for the Court to supply a

16. P. KURLAND, *WATERGATE AND THE CONSTITUTION* 7 (1978). Justice William Paterson, one of the influential Framers, held, "[t]he Constitution is certain and fixed; it contains the permanent will of the people . . . and can be revoked or altered only by the authority that made it." *Van Horne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 303, 308 (C.C.D. Pa. 1795).

17. 5 U.S. (1 Cranch) 137, 176 (1803). For a subsequent paraphrase, see *Poindexter v. Greenhow*, 114 U.S. 270, 291 (1885).

18. 5 U.S. (1 Cranch) at 179-80.

19. Brest, *supra* note 1, at 208; T. COOLEY, *CONSTITUTIONAL LIMITATIONS* 124 (8th ed. 1927). See also text accompanying note 180 *infra*.

20. Brest, *supra* note 1, at 208; *South Carolina v. United States*, 199 U.S. 437, 448 (1895). Lest this seem *too* old-fashioned, mark that Brest himself wrote, "suppose that the Constitution provided that some acts were to be performed 'bi-weekly'. At the time of the framing of the Constitution, this meant only 'once every two weeks'; but modern dictionaries bowing to pervasive misuse, now report 'twice a week' (i.e. semi-weekly) as an acceptable definition. To construe the definition now to mean 'semi-weekly' would certainly be a change of meaning (and an improper one at that)." P. BREST, *PROCESSES OF CONSTITUTIONAL DECISION MAKING* 146 n.38 (1975). Why should greater weight attach to such usage than to the unmistakable intention recorded in debates that the framers meant "bi-weekly?"

Professor Willard Hurst wrote, "[i]f the idea of a document of superior legal authority is to have meaning, terms which have a precise, history-filled content to those who draft and adopt the document must be held to that precise meaning." Hurst, *supra* note 15, at 57.

new ideology,<sup>21</sup> confesses that the Warren Court's "revolution"<sup>22</sup> cannot be justified under the Constitution. That is why Brest, who experiences no difficulty in jettisoning a basic premise of our system which was judicially sanctioned for 150 years, is aghast that the decisions under the fourteenth amendment, about thirty to thirty-five years old, should be questioned.<sup>23</sup>

Brest maintains, however, that "the practice of supplementing and *derogating* from the text and original understanding is itself part of our constitutional tradition."<sup>24</sup> That is a bland apology for judicial arrogation, for the Court early held that "judges cannot remedy political imperfections, nor supply any legislative omission[s]."<sup>25</sup> They cannot, said Marshall, "change that instrument."<sup>26</sup> Usurpation is no more legitimated by repetition<sup>27</sup> than is larceny; the last infraction stands no higher than the first. Consequently the "fact of this tradition" does not "undermine the exclusivity of the written document."<sup>28</sup> No more than other men can judges lift themselves by their bootstraps. Nor can judicial "derogation" from the "written word" rest on long-continued acquiescence by the American people, for as Brest himself recognizes, "acquiescence is not the same as 'consent', which must be informed and knowingly and freely given."<sup>29</sup> These conditions have not in fact been met. The Court has never nakedly avowed that it was acting contrary to the Constitution; instead it has constantly pretended to act as the voice

21. See Robert Cover, at note 75 *infra*.

22. So a faithful activist described it. Kelly, *Clio and the Constitution: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 158. Stanley Kutler, one of Brest's authorities, observed that the "result-oriented jurisprudence" of the Warren Court "witnessed the crumbling of sometimes century-old precedents and the charting of new political and social goals. . . ." Kutler, *Raoul Berger's Fourteenth Amendment: A History of Ahistorical?*, 6 HASTINGS CONST. L.Q. 511, 514 (1979).

23. See text accompanying note 195 *infra*. Many far older precedents were jettisoned by the Warren Court: "The list of opinions destroyed by the Warren Court reads like a table of contents from an old constitutional law casebook." P. KURLAND, *POLITICS, THE CONSTITUTION AND THE WARREN COURT* 90-91 (1970).

24. Brest, *supra* note 1, at 225 (emphasis added).

25. *United States v. Worral*, 2 U.S. (2 Dall.) 384, 395 (1798). In behalf of the Court, Justice Brandeis declared, "[t]o limit the power of the states as urged 'would involve not a construction of the Amendment but a rewriting of it . . .'" *Finch & Co. v. McKittrick*, 305 U.S. 395, 398 (1939).

26. JOHN MARSHALL'S DEFENSE OF *McCULLOCH V. MARYLAND* 209 (G. Gunther ed. 1969).

27. See *Powell v. McCormack*, 395 U.S. 486, 546-47 (1969); *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 290 (1827). "[T]hat people have always been tempted to steal does not mean that stealing is what they should be doing." J. ELY, *supra* note 5, at 44.

28. Brest, *supra* note 1, at 225-26.

29. *Id.* at 226; see R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 155, 353-54 (1977).

of the Constitution, so that activists themselves are beginning to urge "truth in advertising."<sup>30</sup>

Brest perceives the connection between informed consent and legitimacy.

It is simply anti-democratic to conceal something as fundamental as the nature of constitutional decisionmaking — especially if concealment is motivated by the fear that the citizenry wouldn't stand for the practice if it knew the truth. If the Court can't admit what it is doing, then it shouldn't do it.<sup>31</sup>

And he comments: "The premise that the government should be open about its practices seems right, as does the implication that the judiciary has not been fully candid about its decisionmaking process . . . ."<sup>32</sup> But he concludes, "it is not plausible that the truth about constitutional adjudication has been successfully hidden in the face of almost two centuries of continual exposés of the Court's infidelities to the original meaning of the Constitution — criticisms levied by dissenting Justices, lawyers, politicians, and newspaper editors, as well as scholars."<sup>33</sup>

Brest's view was not shared by Professor Felix Frankfurter; he advised President Franklin Roosevelt that "[p]eople have been taught to believe that when the Supreme Court speaks it is not they who speak but the Constitution, whereas, of course . . . it is *they* who speak and *not* the Constitution. And I verily believe that that is what the country needs most to understand,"<sup>34</sup> and still does not. Former Solicitor General Robert Bork observed, "The Supreme Court regularly insists that its results . . . do not spring from the mere will of the Justices . . . but are supported, indeed compelled, by a proper understanding of the Constitution . . . . Value choices are attributed to the Founding Fathers, not to the Court."<sup>35</sup> The Warren Court would not accede to Justice

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30. See note 4 *supra*.

31. Brest, *supra* note 1, at 234.

32. *Id.*

33. *Id.* at 235. A poll taken by Professor Walter Murphy in 1966 concluded that 55% of the people were unaware of what the Court was doing; two-thirds of the remaining 45% did not like the school segregation decisions. *Hearings on the Supreme Court Before the Senate Subcommittee on Separation of Powers*, 90th Cong., 2d Sess. 145 (June 1968).

34. ROOSEVELT & FRANKFURTER: THEIR CORRESPONDENCE, 1928-1945 at 383 (M. Freedman, ed. 1967). Shortly before Solicitor General Robert H. Jackson became a Justice he wrote, "[t]his political role ['continuous constitutional convention'] of the Court has been obscure to laymen — even to most lawyers," R. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* xi (1941), a fact to which I can testify on the basis of my own experience.

35. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3-4 (1971). In a remarkable dissent, concurred in by three of his brethren, Judge Van

Jackson's plea to tell the people that by the desegregation decision it was "declaring new law for a new day."<sup>36</sup> Richard Kluger, who charted the course of that case, considered it "a scarcely reasonable request to make of the brethren,"<sup>37</sup> presumably for the reason voiced by Professor Martin Shapiro: "It would be fantastic indeed if the Supreme Court, in the name of sound scholarship, were to disavow publicly the myth on which its power rests."<sup>38</sup> As Bork remarked, "The way an institution advertises tells you what it thinks its customers demand."<sup>39</sup> Consider, too, academe's general reliance on Bickel's "open-ended" theory,<sup>40</sup> recently translated by Professor John Hart Ely as an "invitation" the framers extended to the Court to override their unmistakable intention.<sup>41</sup> In prominent quarters it still matters to preserve the myth that the Court is effectuating the Constitution.

### *The Special "Competence" of the Courts*

Activists cannot well insist that continuing "consent" is essential to the binding effect of the written Constitution and dispense with "consent" to the contra-constitutional conduct of the Court, to the substitution of its "unwritten Constitution" for the written document. To do him justice, Brest makes no such claim but adopts a suggestion of Owen Fiss that the "legitimacy" of the courts "depends not on the consent — implied or otherwise — of the people, but rather on their

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Graafeiland of the Second Circuit Court of Appeals stated: "Rare indeed is the judge who will concede that his decision departs in the slightest from the meaning and intent of the carefully prepared text [of the Constitution]. The American public must be 'mercifully soothed' into a belief that each judicial pronouncement, no matter how autocratic, is made in compliance with the people's constitutional mandate." *Turpin v. Maillet*, 579 F.2d 152, 172 (2d Cir. 1978).

The "popular view" is that the Court is "obtaining guidance from the Constitution and the neutral principles rooted therein." Leedes, *supra* note 15, at 1413-14. Leedes asks, "what will happen when the public realizes the extent to which the Court is politicized." *Id.* at 1443. Compare Justice Black, writing for the Court: "The responsibility of this Court, however, is to construe and enforce the Constitution and laws of the land as they are and not to legislate social policy on the basis of our personal inclinations." *Evans v. Abney*, 369 U.S. 435, \_\_\_\_ (1970).

36. R. KLUGER, *SIMPLE JUSTICE* 681, 689 (1976).

37. *Id.* at 683.

38. M. SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT* 27 (1964). Respecting the judges' practice of deciding cases "in accord with their personal conscience and judgment," Professor W. R. Forrester stated that his students "say that if the American people knew they would have no confidence in the Court as the impartial arbiter. . . ." *Forum: Equal Protection and the Burger Court*, 5 HASTINGS CONST. L.Q. 645, 675 (1975).

39. Bork, *supra* note 35, at 4.

40. For analysis of this theory, see R. BERGER, *supra* note 29, at 99-116 (1977).

41. For comment thereon, see Berger, *Government by Judiciary: John Hart Ely's "Invitation"*, 54 IND. L.J. 277 (1979).



competence, on the special contribution they make to the quality of our social life."<sup>42</sup> Such a tenet was disclaimed by the Court. Speaking by Justice Jackson, it declared:

[N]or does our duty to apply the Bill of Rights to assertions of official authority depend upon our possession of marked competence in the field where the invasion of rights occurs . . . . But we act in these matters not by authority of our competence but by force of our commissions.<sup>43</sup>

Who is to determine that the courts are specially "competent" to decide what "the quality of our social life" should be, or "those values which are fundamental to our society."<sup>44</sup> Obviously not the people, for

42. Brest, *supra* note 1, at 226. Brest also suggests an "alternative theory," derived by Ely from the *Carolene Products* footnote, *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1939), limited to safeguarding "the integrity of majoritarian processes and the rights of minorities," for Ely maintains that "courts are not competent to ascertain and apply any other 'fundamental values.'" Brest, *supra* note 1, at 227. For analysis of the Ely theory, see Berger, *Ely's "Theory of Judicial Review"*, 42 OHIO ST. L.J. 87 (1981). Here it may be noted that this too is a judicial construct representing, as Professor George Braden wrote, simply a part of one man's "set of values for his society," which he holds strongly enough to enforce when opportunity arises. Braden, *The Search for Objectivity in Constitutional Law*, 57 YALE L.J. 571, 588-89 (1948). Dean Terrance Sandalow observes that the *Carolene Products* footnote rests upon "a conception of the judicial function that cannot be reconciled with democratic values." Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1163 (1977).

Earlier, Ely concluded that the framers of the fourteenth amendment had issued "an open and across-the-board invitation to import into the constitutional decision process considerations that will not be found in the amendment nor even . . . elsewhere in the Constitution." The resultant "untethered" discretion was so "frightening" ("scary" he now says), however, that he cautioned against its use in the absence of yet-to-be developed limiting principles. Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 415, 425, 448 (1978). For my comments thereon see note 41 *supra*. Apparently his revival of the *Carolene Products* footnote is to serve as the limiting principle. But Chief Justice Stone, who had fathered the footnote, before long complained that "[t]he Court is now in as much danger of becoming a legislative and Constitution making body, enacting into law its own predilections" as its predecessors. A. MASON, *SECURITY THROUGH FREEDOM: AMERICAN POLITICAL THOUGHT AND PRACTICE* 145-46 (1955).

43. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639, 640 (1943).

44. Brest, *supra* note 1, at 227. Justices Stone, Brandeis, and Cardozo rejected the "assumption that the responsibility for the preservation of our institutions is the exclusive concern of any one of the three branches. . . ." *United States v. Butler*, 297 U.S. 1, 87-88 (1936) (Stone, J., Brandeis & Cardozo, J.J., dissenting). Brest overlooks that the basic issue "is not a question of judicial institutional capacity; it is rather one of judicial constitutional legitimacy." Abraham, *"Equal Justice Under Law" or "Justice At any Cost"? The Judicial Role Revisited; Reflections on "Government by Judiciary"; Transformation of the Fourteenth Amendment*, 6 HASTINGS CONST. L.Q. 467, 470 (1979). More simply, that one is an expert does not endow him with power to act in public affairs. Ely reminds us of

Brest does not suggest that the issue be submitted to a referendum. Nor can the legislature be within his contemplation, for the courts habitually supersede and take over legislative functions, presumably on the premise that they are more "competent." Thus the *Court would confer power on itself*, as Brest acknowledges: "For better or for worse, the judiciary *has assumed* a major role in protecting" both "individual rights and decision-making through democratic processes."<sup>45</sup> Activist outcries against the abortion decisions and Judge Garrity's take-over of the Boston schools<sup>46</sup> indicate that the self-conferred power can be

Judge J. Skelly Wright's statement, "an argument for letting the experts decide . . . is an argument for paternalism and against democracy." ELY, *supra* note 5, at 134.

Professor Louis Lusky observes that like "the now discredited substantive due process doctrine of such cases as *Lochner v. New York* (1905)," "fundamental rights" leaves "the Court entirely at large, with full freedom to enact its own natural law conceptions." L. LUSKY, *BY WHAT RIGHT?* 266 (1975), a result unabashedly embraced by Messrs. Brest and Cover, *see* note 75 *infra*.

Compare with Brest's tribute to the special "competency" of the Justices, Professor Alan Dershowitz's review of Justice William O. Douglas' autobiography in *Book Review*, N.Y. Times, Nov. 2, 1980, at 9, col. 1 and 26. There he writes, that the Supreme Court consists of nine men "who are generally mediocre lawyers, often former politicians . . . almost always selected on the basis of political considerations." And he asks, "[h]ow, in a democratic society, can nine unelected and politically non-responsible men overrule the policy choices of state legislatures, Congress, popular referenda. . . . Why should judges have the last word . . . on such emotionally laden issues as abortion, busing, [and] pornography . . .?" He recounts Chief Justice Hughes's advice to the neophyte Justice Douglas, "ninety percent of any [constitutional] decision is emotional. The rational part of us supplies the reason for supporting our predilections." Then and there Douglas admitted to himself that "the 'gut' reactions of a judge at the level of constitutional adjudication . . . was the main ingredient of his decision." Excerpt from *Justice Douglas' Autobiography*, N.Y. Times, Sept. 21, 1980, § (Magazine), at 39, 40. Why should millions of Americans who consider, for example, that death penalties serve to deter murder, prefer the "gut reaction" of the Justices to their own? We live under a government of laws, not of gut reactions. And Dershowitz concludes that "[t]here will never be an entirely satisfactory justification for the power of judges to overrule popular decisions." In fact the alleged power is demonstrably a usurpation.

45. Brest, *supra* note 1, at 226 (emphasis added). Ely notices the "distrust of the self-serving motives of those in power. . . ." J. ELY, *supra* note 5, at 136. Chief Justice Denman observed that "[t]he practice of a ruling power in the State is but a feeble proof of its legality." *Stockdale v. Hansard*, 112 E.R. 1112, 1171 (Q.B. 1839).

46. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973). Professor Henry Abraham admonishes the Court not to "view itself as a 'social reform agency' [as] when it wrote what, in effect, constitutes a Federal Abortion Code. . . ." Abraham, *supra* note 44, at 479. Similarly, though Abraham accepts the desegregation decision, he rejects those that follow in its train: "[T]he court had no constitutional mandate to turn itself . . . into a combination of national school board, transportation expert, disciplinarian, employment manager and admissions director." *Id.* at 480. *See also* Lusky, note 81 *infra*. Compare Brest's own split with the Court over its *Ramirez* decision. *See* text accompanying notes 93-99 *infra*.

exercised for the "worse." Consider Henry Steel Commager's scathing comment on the pre 1937 Court.

[The record] discloses not a single case, in a century and a half, where the Supreme Court has protected freedom of speech and press. It reveals no instance . . . where the Court has intervened on behalf of the underprivileged — the Negro, alien, women, children, workers, tenant farmers. It reveals, on the contrary, that the Court has effectively intervened, again and again, to defeat Congressional attempts to free the slave, to guarantee civil rights to Negroes, to protect workingmen, to outlaw child labor, to assist hard-pressed farmers, and to democratize the tax system.<sup>47</sup>

Shortly before he was appointed to the Supreme Court, Solicitor General Robert H. Jackson wrote, "time has proved that [the Court's] judgment was wrong on most of the outstanding issues upon which it has chosen to challenge the popular branches,"<sup>48</sup> a stricture confirmed by respected scholars.<sup>49</sup> In their rapture over the Warren Court's adoption of *their* "values," Brest and his ilk overlook that "[a] single generation's experience with judicial review . . . does not wipe out the experience of a century and a half."<sup>50</sup> The Court may yet again turn against their dearest convictions.

"Having abandoned both consent and fidelity to the text and original understanding as the touchstones of constitutional decision-making," Brest proposes "a designedly *vague criterion*"<sup>51</sup> (a carping critic may view it as a blank check), this to determine whether the Court or the people themselves shall decide their destiny! So he cites

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47. Commager, *Judicial Review and Democracy*, 19 VA. Q. REV. 417, 428 (1943). "Meanwhile," Professor Leonard Levy wrote, "millions of Negroes suffered lives of humiliation for five or more decades . . . because the Court betrayed the intent of the Reconstruction Amendments." L. LEVY, *JUDICIAL REVIEW AND THE SUPREME COURT* 35 (1967).

Brest's rosy view of unfettered judicial discretion was not shared by Lord Camden: "[The discretion of a Judge is] the law of tyrants . . . . In the best it is oftentimes caprice: In the worst it is every vice, folly and passion, to which human nature is liable." Quoted in *McGautha v. California*, 402 U.S. 183, 285 (1971) (Brennan, J., dissenting). In 1767, Chief Justice Hutchinson of Massachusetts said, "*the Judge* should never be the *Legislator*: Because, then the Will of the Judge would be the Law: and this tends to a State of Slavery." Quoted in Horwitz, *The Emergence of an Instrumental Conception of American Law, 1780-1820*, in 5 PERSPECTIVES IN AMERICAN HISTORY 287, 292 (1971).

48. R. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 37 (1941).

49. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. LAW 279, 292-93 (1957); Burns, "*Dictatorship — Could it Happen Here?*", in *HAS THE COURT TOO MUCH POWER?* 234, 236 (C. Roberts ed. 1974).

50. L. LEVY, *supra* note 47, at 23.

51. Brest, *supra* note 1, at 226 (emphasis added).

Owen Fiss's argument that "the judiciary should give 'concrete meaning and application to our constitutional values.'" <sup>52</sup> Consider suffrage: the unmistakable exclusion of suffrage from the fourteenth amendment, and subsequent resort to the fifteenth, nineteenth and twenty-sixth amendments in order to admit blacks, women and eighteen-year olds to suffrage evince the common understanding that suffrage was not an immanent "value" but a creature of express grant. Certainly the "values" of the fourteenth cannot honestly be invoked for "one person-one vote" in the teeth of the exclusion of suffrage therefrom, a fact Brest now acknowledges. <sup>53</sup> Similarly, Brest concedes that "the nation was not ready to eliminate ['school segregation'] in the 1860's" <sup>54</sup> but argues in defense of Chief Justice Warren's desegregation decision that "the nation's values had shifted significantly by 1954." <sup>55</sup> Yet he admits that an amendment to abolish segregation would have failed: "Imagine, if you will, the fate of an amendment proposed in the mid-50's to protect Communists or to require school desegregation." <sup>56</sup> Even after the desegregation decree there was massive resistance in both North and South, <sup>57</sup> and for long the Court could enlist neither Congress nor the President to implement its drive. It was because the Court was well aware of such public sentiment that it turned down Justice Jackson's plea that it inform the people it was "declaring new law for a new day." <sup>58</sup> To urge that such conduct gives "concrete meaning and application to our constitutional values" <sup>59</sup> is therefore to pervert language and history. What the Court did was to abort them.

52. *Id.* at 227. Robert Bork points out that when the Court "chooses fundamental values" it "makes rather than implements value choices," and that "cannot be squared with the presuppositions of a democratic society." Bork, *supra* note 35, at 6.

53. See text accompanying notes 203-05 *infra*.

54. Brest, *Book Review*, N.Y. Times, Dec. 11, 1977, § 11, at 10, col. 3. See note 204 *infra*.

55. Brest, *supra* note 1, at 230. Ely, however, doubts that "opinion nationwide . . . had moved [by 1954] to the point of condemning 'separate but equal schooling.'" J. ELY, *supra* note 5, at 66. Such racism "remains today a strong strain in American life." *Id.*

56. Brest, *supra* note 1, at 237.

57. Van Alstyne, *Making Sense of Desegregation and Affirmative Action*, 57 TEX. L. REV. 1489, 1491 (1979). This segregation sequence is a fine exhibit for Brest's view that the sources are "defeasible in the light of changing public values." Brest, *supra* note 1, at 229.

58. R. KLUGER, *supra* note 36, at 681, 689.

59. Brest, *supra* note 1, at 227.

60. See R. BERGER, *supra* note 29, at 60-64. In a tacit recantation, Alfred Kelly, an activist who had been of counsel for the NAACP in the desegregation case, declared, "the commitment to traditional state-federal relations meant that the radical *Negro reform* program would be *only* a very limited one." (quoted in Brest, *supra* note 1, at 242). Professor Don Fehrenbacher noticed a "widespread and tenacious resistance to the

On a par with the Court's reversal of the Framers' exclusion of suffrage and segregation from the scope of the fourteenth amendment, is its interference with state administration of criminal law on the theory that the amendment "incorporated" the Bill of Rights. In light of the Framers' attachment to state sovereignty, the reservation by the tenth amendment to the states of all rights not delegated to the federal government,<sup>60</sup> it requires convincing evidence that the Framers intended to surrender powers that ran beyond the Civil Rights Act.<sup>61</sup> Justice Frankfurter asked Justice Black: "Is it conceivable that an amendment" establishing a "uniform system of judicial procedure" would have been "submitted" or "ratified?"<sup>62</sup> Charles Fairman's scrupulous study, in which other scholars concur,<sup>63</sup> and which my own research confirmed,<sup>64</sup> refutes Black's historical theorizing. In stating that "the selective incorporation of the Bill of Rights into the fourteenth amendment . . . implicated venerable traditions of state diversity and

interventional federalism aggressively embodied. . . ." D. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 581 (1978).

Senator Frederick Frelinghuysen, a Framers and broad constructionist of the fourteenth amendment, stated in 1871 that it must "not be used to make the General Government imperial. It must be read in the light of our judicial history, and be read together with the tenth amendment. . . . Thus reading the fourteenth amendment . . . I do not consider it now expedient for the General Government to assume a general municipal jurisdiction over crimes in the States." CONG. GLOBE, 42d Cong., 1st Sess. 501. Another leader, Senator Lyman Trumbull, also rejected a federal "right to pass a general criminal code for the States. . . ." *Id.* at 579.

61. See Brest, *supra* note 1, at 235 and note 201 *infra*. In the course of the framing of the fourteenth amendment, Senator James W. Patterson of New Hampshire, was "opposed to any law discriminating against [blacks] in the security and protection of life, liberty, person, property and the proceeds of their labor"; "beyond this," he said, "I am not prepared to go." CONG. GLOBE, 39th Cong., 1st Sess. 2699 (1866). For other citations see R. BERGER, *supra* note 29, at 170.

62. G. DUNNE, *HUGO BLACK AND THE JUDICIAL REVOLUTION* 261 (1977). See Senator Frelinghuysen's remark, *supra* note 60.

63. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights*, 2 STAN. L. REV. 5 (1949). Bickel considered that Fairman "conclusively disproved Justice Black's contention; at least, such is the weight of opinion among disinterested observers." A. BICKEL, *THE LEAST DANGEROUS BRANCH* 102 (1962). An activist, Professor Dean Alfange, Jr. considers it "all but certain that the fourteenth amendment was not intended to incorporate the Bill of Rights and thus to revolutionize the administration of criminal justice in the states." Alfange, *On Judicial Policymaking and Constitutional Change: Another Look at the "Original Intent" Theory of Constitutional Interpretation*, 5 HASTINGS CONST. L.Q. 603, 607 (1978). Another activist, Professor Michael Perry, concurs in my view that "the proposition 'that the Fourteenth Amendment incorporated the Bill of Rights' constitutes an invasion of rights reserved to the States by the Tenth Amendment, an invasion of such magnitude as to demand proof that such was the framers' intention." Perry, Book Review, 78 COLUM. L. REV. 685, 690 (1978).

64. Berger, *supra* note 29 at, 134-56. See also Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 OHIO ST. L.J. 435 (1981).

autonomy,"<sup>65</sup> Brest obliquely concedes that it was a part of the "constitutional decision-making concerning the allocation of powers . . . [that] has not been particularly faithful to the text and original understanding of the Constitution,"<sup>66</sup> an admirably chaste and restrained description of judicial arrogation. But he relies on "a changing conception of federalism. I cannot prove the point, but the mature doctrine, though not necessarily every judicial gloss on particular clauses, seems responsive to current public norms."<sup>67</sup> How much "seems responsive" because of the people's mistaken belief that the given "gloss" was required by the Constitution rather than by the Justices it is not necessary here to determine. "Particular glosses," however, plainly run counter to the people's wishes with respect to pornography, death penalties, busing, abortion and the like.<sup>68</sup>

A leading activist, Ely, has crushingly impeached the judicial "competence" to ascertain "fundamental values," showing that a divorce between a judge's personal values and the social consensus is delusory, that what he is really discovering are his own values, and that judges are by no means "best equipped to make moral judgments, in particular that they are [not] better suited to the task than legislators."<sup>69</sup> Elbridge Gerry had made a similar argument in the Convention, leading it to

65. BREST, *supra* note 1, at 233.

66. *Id.* at 237 n.124.

67. *Id.* at 233.

68. For citations, see B. BERGER, *supra* note 29, at 325-27. Noting Professor Lusky's reference to current prejudice against minorities that "most people can discern simply by examining their own attitudes," Professor Randall Bridwell shrewdly remarks, "[h]ow the Court . . . was 'driven' to make decisions, that 'people at large have accepted' but which, oddly, run counter to deep-seated prejudices that have to be overridden by these judicial decisions, is quite interesting." Bridwell, *The Scope of Judicial Review: A Dirge for the Theorists of Majority Rule?*, 31 S. CAR. L. REV. 617, 632 n.62 (1980).

69. Ely, *Forword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 16, 35 (1978). He notes that "Lenin used to claim this god-like gift of divination of the people's 'real' interests. . . ." *Id.* at 51 n.198. Experience has shown, activist Lusky wrote, "that the Justices are not endowed with divine insights into the needs of a healthy society." Lusky, *supra* note 44, at 107. See statement of Justice Jackson at text accompanying note 48 *supra*. Professor Leedes observes, "[e]quating the judge's political philosophy . . . with the community's 'constitutional morality' is a ploy to conceal the truism that the judge's philosophy is a starting premise that is not empirically verifiable." Leedes, *supra* note 15, at 1385.

Alexander Bickel, whom Brest recommended to me, Brest, *supra* note 54, at 44, wrote that were the ultimate "reality" that judicial review spells nothing more than "personal preference," then judicial "authority over us is wholly intolerable and totally irreconcilable with the theory and practice of political democracy." A BICKEL, *THE LEAST DANGEROUS BRANCH* 80 (1962). "A sceptic," Brest states, "might in any case question the judges' ability to discern fundamental public or social values." Nevertheless, he argues, adjudication "is better than originalism." This is a sad basis for setting aside an

reject judicial participation in the presidential veto of legislation: "It was quite foreign from the nature of the office to make them judges of the policy of public measures." Nathaniel Gorham observed that judges "are not to be presumed to possess any peculiar knowledge of the mere policy of public measures."<sup>70</sup> In truth, judicial divination of "certain enduring values"<sup>71</sup> is a chimera. For as Professor Mark Tushnet points out, "the fragmentation of American society makes it impossible to support the view that a single set of intuitions is pervasively shared . . . ."<sup>72</sup> Ours is a society composed of many diverse groups having quite different ideas as to what constitutes the good life.

If values are not derived from the Constitution, but in Alexander Bickel's words, from the "evolving morality of our tradition,"<sup>73</sup> — a euphemism for judicial soothsaying — what, asks Dean Terrance Sandalow, are courts "to look for"? If values "change over time, by what standard are courts to determine whether a particular step in the evolutionary process is or is not permissible"?<sup>74</sup> These are pragmatic objections; more disquieting is the fact that he who defines our

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unmistakable determination by framers and ratifiers, as in the case of their exclusion of suffrage from the fourteenth amendment.

Brest's fellow activist, Arthur S. Miller, concluded that the Justices have not been prepared "for the task of constitutional interpretation. . . ." Miller, *The Elusive Search For Values in Constitutional Interpretation*, 6 HASTINGS CONST. L. Q. 487, 500 (1979). Few have "the broad gauged approach and knowledge" essential to "search for and identify the values that should be sought in constitutional adjudication." *Id.* at 507. And the Justices labor under the grave disadvantage of employing what Miller terms the "faulty" "adversary system as a means of settling public policy," faulty on at least three scores — the competence of the personnel, an inability to measure the consequences of alternative decision and the flow of information to the judges." The "system itself," he sums up, "is inadequate to the need." *Id.* at 508.

70. 1 M. FARRAND, *supra* note 3, at 97–98; *id.* at Vol. 2 at 73.

71. Brest, *supra* note 1, at 227. Academe applauds Supreme Court decisions as "embodiments of principles of justice, defined as the standard political principles of the moderate-left of the Democratic party." Tushnet, *Truth, Justice, and the American Way: An Interpretation of the Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1322 (1979).

72. Tushnet, *supra* note 71, at 1320. Leeds also notes the absence of "shared values." Leeds, *supra* note 15, at 1390. Robert Bork points out that when the Court "chooses fundamental values," it "makes rather than implements value choices," and that "cannot be squared with the suppositions of a democratic society." Bork, *supra* note 35, at 10–11.

73. A. BICKEL, *supra* note 69, at 236. "[O]ur society does not, rightly does not, accept the notion of a discoverable and objectively valid set of moral principles, at least not a set that could plausibly serve to overturn the decisions of our elected representatives." J. ELY, *supra* note 5, at 56. The claim that "our 'insulated' judiciary has done a better job of speaking for our better moral selves turns out to be historically shaky." *Id.* at 57.

74. Sandalow, *supra* note 42, at 1181. As late as 1918, Justice Holmes stated that the "Court always had disavowed the right to intrude its judgment upon questions of policy or morals." *Hammer v. Dagenhart*, 247 U.S. 251, 280 (1918) (dissenting opinion in which Justices McKenna, Brandeis and Clarke concurred).

"fundamental values" rules the nation, a result from which ideologues like Brest and Robert Cover do not shrink.<sup>75</sup> Against such "dangerous discretion to roam at large in the trackless field of their own imaginations,"<sup>76</sup> an historically clear legislative intention offers a safer mooring. Moreover, as Professor Richard Kay observes:

To implement real limits on government the judge must have reference to standards which are external to, and prior to, the matter to be decided. This is necessarily historical investigation. The content of those standards are set at their creation. Recourse to "the intention of the framers" in judicial review, therefore, can be considered as indispensable to realizing the ideas of government limited by law.<sup>77</sup>

Brest argues in favor of judicial governance that judges are "independent."<sup>78</sup> That very fact, their unaccountability, argues against handing political policy over to them. Judicial "independence" was not meant to dissolve "limits" on judicial power or to deprive the people of control over policy-making. In what Brest concedes is "an idealized description" of judicial method, he prefers rule by judges because they articulate the reasons for their decisions.<sup>79</sup> But activists themselves are most unhappy on this score; they variously assail the decisions as "gibberish,"<sup>80</sup> "wanton";<sup>81</sup> others point to "lunatic," "inconsistent" decisions,<sup>82</sup> a veritable "shambles,"<sup>83</sup> upon which academicians vainly

75. Cover asserted, "a reading of the Constitution must stand or fall not upon the Constitution's self-evident meaning nor upon the intentions of the 1787 or 1866 framers . . . [I]t is for us, not the framers, to decide whether that end of liberty is best served by entrusting the judges a major role in defining our governing political ideals and in measuring the activity of the primary actors in majoritarian politics against that ideology." Cover, Book Review, *NEW REPUBLIC*, Jan. 14, 1978, at 26, 27. Contrast with Brest's the "sources are . . . defeasible in the light of changing public values," Brest, *supra* note 1, at 229, Sandalow's statement that "if constitutional law is to evolve over time, the legitimacy of the changes depends upon popular consent expressed through a democratic political process. . . ." Sandalow, *supra* note 42, at 1189.

76. J. KENT, *COMMENTARIES ON AMERICAN LAW* 373 (9th ed. 1858).

77. Kay, Book Review, 10 *CONN. L. REV.* 801, 805-06 (1978); *see also* Leedes, *supra* note 35, at 1397. For Judge Learned Hand's reliance on "historical meaning," *see* L. HAND, *THE BILL OF RIGHTS* 65 (1962).

78. Brest, *supra* note 1, at 228.

79. *Id.*

80. *See* text accompanying note 87 *infra*.

81. Activist Lusky, who defends the desegregation decision, condemns the post-1968 school cases because they have "led to grotesquely destructive results, wantonly . . . wreck[ed] a number of local public school systems and outrag[ed] the communities they serve." Lusky, *supra* note 44, at 413, 424. To the same effect, *see* Abraham, *supra* note 46.

82. Tushnet, *supra* note 71, at 1323, 1325.

83. Leedes, *supra* note 15, at 1403.



strive "to superimpose a facade of rationality."<sup>84</sup> Consider *Bolling v. Sharpe*<sup>85</sup> in which Chief Justice Warren read the "equal protection clause" of the fourteenth amendment into the fifth, a decision which Ely, to whom Warren is a "carefully" chosen "hero,"<sup>86</sup> says is "gibberish both syntactically and historically,"<sup>87</sup> and which Brest agrees "is not supported by even a generous reading of the fifth amendment."<sup>88</sup> Warren's reasoning is a prize exhibit of the judicial genius for "articulation" of reasons that justify decision: "[I]n view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."<sup>89</sup> Having reversed the Framers' intention to exclude suffrage from the fourteenth amendment, symmetry required that the unconstitutional revision be pushed still further back! It is as if one who crashed through a hydrant felt constrained to complete the demolition by driving through a store window.

Nevertheless *Bolling* passes muster with Brest because he "cannot think of a plausible argument against this result — other than . . . that it is not supported by . . . the fifth amendment,"<sup>90</sup> which should be reason enough. Respect for the integrity of constitutional decision-making, for the Constitution itself, is more than "plausible," it goes to the heart of our democratic system. If the criterion be a "result" pleasing to a given judge and his admirers, then is the Constitution indeed irrelevant, and we are returned to the administration of "justice" in a given case after the manner of a Kadi sitting under a tree.<sup>91</sup> Once

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84. Tushnet, *supra* note 71, at 1325.

85. 347 U.S. 497 (1954).

86. J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW*, Dedication (1980).

87. *Id.* at 32.

88. Brest, *supra* note 1, at 233.

89. 347 U.S. at 500.

90. Brest, *supra* note 1, at 233.

91. Such reasoning, as Leedes observes, "benignly subverts the political system contemplated by liberal thought — one that functions by means of determinate rules, admittedly *unjust* in particular cases but designed to avoid the constantly recurring need for equitable decisionmaking by judges and other officials." Leedes, *supra* note 15, at 1389.

The Founders' "profound fear" of judicial discretion, G. WOOD, *CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 298 (1969), precludes an easy inference that such discretion was delegated. See comments of Chief Justice Hutchinson, *supra* note 47. Professor Harry W. Jones also adverts words to "the prevailing distrust of judicial discretion." Jones, *The Common Law in the United States: English Themes and American Variations*, in *POLITICAL SEPARATION AND LEGAL CONTINUITY* 103 (H. Jones ed. 1976).

"results" are decisive, articulated reasons are superfluous; indeed the attempt to rationalize *ad hoc* decisions has produced a labyrinth.<sup>92</sup>

When, however, the result is displeasing to Brest, he parts company with the Court,<sup>93</sup> for example, in *Richardson v. Ramirez*,<sup>94</sup> wherein the Court refused to extend the equal protection doctrine to prohibit the disfranchisement of ex-felons. The Court concluded that "those who framed and adopted the Fourteenth Amendment *could not have intended* to prohibit outright in section 1 of that Amendment that which was expressly exempted from the lesser sanction of reduced representation imposed by section 2 of the Amendment."<sup>95</sup> Now the Framers categorically stated that this "reduced representation" provision of section 2 demonstrated that suffrage was excluded from section 1,<sup>96</sup> an assurance essential to passage of the amendment, so that on the Court's own reasoning the "one person-one vote" doctrine is indefensible. In *Ramirez* the Court elevated the *presumed* intent above the clearly demonstrable *actual* intent because it preferred the *Ramirez* result. For Brest,

[The Court's analysis seems] correct but beside the point. The adopters would probably have disapproved of all the court's modern voting rights decisions . . . . But the moral and political principles on which the modern decisions depend apply with equal force to convicted felons. To adhere to the general doctrine but not require the state to justify its discrimination is arbitrary and unprincipled.<sup>97</sup>

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92. See text accompanying notes 82–84 *supra*. In Anatole France's delightful satire on the Dreyfus case — wherein the French Army, trapped in false charges on which it condemned Captain Dreyfus to Devil's Island, piled forgery upon forgery to thwart reversal — the Minister of War calls upon the Chief of Staff and is startled to see files of "evidence" stacked to the ceiling. Told that these were proofs of Dreyfus' guilt, the Minister remarked, "Proofs! Of course it is good to have proofs, but perhaps it is better to have none at all." Originally, he continued, the case "was invulnerable because it was invisible. Now it gives an enormous handle for discussion." A. FRANCE, *PENGUIN ISLAND* 194 (N.Y. 1933).

93. Other activists also make their own moral judgments the test. See Lusky, *supra* note 81; and Abraham, *supra* note 46.

94. 418 U.S. 24 (1974).

95. *Id.* at 43 (emphasis added).

96. For example, John Bingham, draftsman of the fourteenth amendment, states "The amendment does not give, as the second section shows, the power to Congress of regulating suffrage in the several states." CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866). Senator Jacob Howard, who explained the amendment to the Senate, said, "[t]he second section leaves the right to regulate the elective franchise still with the States, and does not meddle with that right." *Id.* at 2766. For additional citations, see R. BERGER *supra* note 29, at 64–68.

97. Brest, *supra* note 1, at 233–34.

Thus Brest shifts gears from "results" to "principles." Why are the Court's own "principles" more "binding" than those of the Framers? If it be on the ground of "values" or "morals," Brest can hardly substitute his own for those of the Court after maintaining its special "competence" to ascertain fundamental values.<sup>98</sup> He would make *his* morals the test of constitutionality when it is the Court that is allegedly keeper of the "national conscience."<sup>99</sup>

In truth, to borrow from Sandalow, the legislature is a better instrument of change than the courts, because the lawmakers "are amenable to popular control through ordinary political processes," a vital need if law is to respond "to the interests and values of the citizenry."<sup>100</sup> Moreover, "the active and continuous participation of the governed in their government, either directly or by representation . . . has been understood to be central to the democratic ideal."<sup>101</sup> As Professor Gary Leedes remarks, "[w]e should be skeptical of any model that proposes to replace our system of representative democracy with rule by a benevolent and omniscient judicial aristocracy,"<sup>102</sup> the "Platonic Guardians" rejected by Learned Hand, and even earlier by Elbridge Gerry.<sup>103</sup>

### *Minority Rights*

Brest is driven to denounce the binding effect of the Constitution by his concern for minority rights.<sup>104</sup> the "interests of black Americans were not adequately represented in the adoption of the Constitution of 1787 or the fourteenth amendment." The "fact that a provision was drafted by an unrepresentative and self-interested portion of the adoptors' society weakens its claim on a different society one or two hundred years later."<sup>105</sup> Good enough, let Brest's generation change the

98. *Id.* at 227.

99. Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 689 (1960).

100. Sandalow, *supra* note 42, at 1166.

101. *Id.* at 1178. Ely also stresses the anti-democratian nature of the Court's role. Ely, *supra* note 42, at 404-05, 408-09, 411. He concludes that "[a]n untrammelled majority is indeed a dangerous thing, but it will require a heroic inference to get from that realization to the conclusion that enforcement by unelected officials of an 'unwritten constitution' is an appropriate response in a democratic republic." *Id.* at 411. He finds that "heroic inference" in an alleged "invitation" issued by the Framers to incorporate extra-constitutional values. See Berger, *supra* note 41.

102. Leedes, *supra* note 15, at 1436.

103. L. HAND, *THE BILL OF RIGHTS* 73 (1962); for Gerry, see text accompanying note 125 *infra*.

104. Some commentators "approach vindication of a minority as the fundamental principle of constitutional law." Bridwell, *supra* note 66, at 38 n.89.

105. Brest, *supra* note 1, at 230.

provision according to article V. But one of his fellow activists, Sanford Levinson, whom he cites, urged that "those who feel tyrannized by the existing legal order [need not] recognize it as legitimate."<sup>106</sup> In that case they are poorly positioned to invoke the Constitution against the majority.<sup>107</sup>

Originally it was premised that the rights of minorities "protected by the Courts were established in the Constitution."<sup>108</sup> Brest acknowledges that "[m]any of what we have come to regard as the irreducible minima of rights are actually supra-constitutional; almost none of the others are entailed by the text or original understanding."<sup>109</sup> More baldly, most minority "rights" are judge-made, without roots in the Constitution. Yet the Court, holding that there is no constitutional "right to education," stated: "It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws."<sup>110</sup> Given that we are not bound by the Constitution, nor by the same logic by its creatures, judges, what compels the majority to go beyond what it is ready to confer?

Since minority "rights" supply the motive power for academe's rejection of constitutional limitations, their scope is worth developing. One cannot speak of minority "rights" *en gros*; Gouverneur Morris, defender of propertied minority, said in the Convention, "within the State itself a majority must rule, whatever may be the mischief done

106. *Id.* at 234 n.116; Levinson, *The Specious Morality of the Law*, HARPER'S, May 1, 1977, 35, 40.

107. See note 5 *supra*. Brest recognizes that "[t]he Constitution reflects pragmatic and not always principled compromise among a variety of regional, economic, and political interests," but considers that "there is no justification for binding the present to the compromises of another age." Brest, *supra* note 1, at 229. "Compromises" are a part of the political, not the judicial, process and if they are to be displaced in favor of new "compromises," for such is the nature of our polity, it should be by resort to the people and their representatives, the more since according to Brest the people remain attached to the Constitution.

108. Sandalow, *supra* note 42, at 1173. It "is important to note," Bridwell observes, "that the protection of minorities permitted or required by the Constitution is itself a product of majority decisions, and not simply some overriding 'just' principle that the judiciary is charged with enforcing, without regard to whatever else the Constitution might say." Bridwell, *supra* note 68, at 638 n.89.

109. Brest, *supra* note 1, at 236. "[W]e are repeatedly told by the courts that the current egalitarianism which they are helping to impose derives from the American Constitution. That, I think, is arrant nonsense. It is not being taken from the Constitution, it is being put into it." Kurland, *Ruminations on the Quality of Equality*, 1979 B.Y.U. REV. 1, 8. Professor Robert G. McCloskey stated that "during the past 30 years, the Court has built a whole body of Constitutional jurisprudence in this field broadly called civil liberties almost out of whole cloth. It has been making new laws . . . ." *Hearings*, *supra* note 32, at 98.

110. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 33 (1973).

among themselves."<sup>111</sup> The 1787 Constitution largely defined a structure of government, delineating its powers; such individual rights as were granted dealt with security of property, commerce and contracts. Broader individual rights are first enumerated in the Bill of Rights, applicable to *all* of the people, not any particular minority, in great part designed to secure established criminal procedures in prosecutions<sup>112</sup> by a remote and suspect federal government. Certainly the Constitution did not create a "roving judicial commission to protect minorities against majorities in all cases."<sup>113</sup>

Elsewhere I have shown that the fourteenth amendment did not create a charter of unlimited minority rights.<sup>114</sup> Brest now concedes that the "adopters of the equal protection clause probably intended it not to encompass voting discrimination at all."<sup>115</sup> A number of activist commentators agree that the Framers equally excluded segregation from its scope.<sup>116</sup> Brest is still unwilling to admit that the amendment merely incorporated the Civil Rights Act of 1866, which prohibited discrimination only with respect to the imposition of punishments and the rights to own property, enter into contracts, sue and be sued, and testify in court. This Brest calls a "narrow reading"<sup>117</sup> but it faithfully mirrors the express terms of the Act, and is confirmed by the legislative history. And in 1870, Justice Bradley held that "the civil rights bill was enacted at the same session, and but shortly before the presentation of the fourteenth amendment . . . [it] was in *pari materia*; and was probably

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111. 2 M. FARRAND, *supra* note 3, at 439. James Wilson stated: "The majority . . . would be no more governed by interest than the minority. It was surely better to let the latter be bound hand and foot than the former." *Id.* at 451. "[R]ule in accord with the consent of a majority of those governed is the core of the American governmental system." Ely, *supra* note 42, at 411.

112. L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 3 (1972).

113. Bridwell, *The Federal Judiciary: America's Recently Liberated Minority*, 30 S. CAR. L. REV. 467, 475 (1979). Nor did they disable themselves "from taking a position contrary to any minority interest." *Id.* at 476.

114. R. BERGER, *supra* note 29, at 20-68, 117-31, 166-214.

115. Brest, *supra* note 1, at 115.

116. Professor Nathaniel Nathanson concluded that the view that the fourteenth amendment "would not require school desegregation . . . was quite conclusively demonstrated by Alexander Bickel. . . ." Nathanson, *Constitutional Interpretation and the Democratic Process*, 56 TEX. L. REV. 579, 580-81 (1978). Abraham considers that "[a]ny genuinely objective, factual and rigorous examination of the debates and history of the framing of the Fourteenth Amendment demonstrates that the authors and supporters of that provision specifically rejected its application to segregated schools and the franchise." Abraham, *supra* note 44, at 467. See also Bridwell, *supra* note 113, at 913-14 n.32; Perry, *supra* note 63, at 696.

117. Brest, *supra* note 1, at 230.

intended to reach the same object . . . the first section of the bill covers the same ground as the fourteenth amendment . . . ."<sup>118</sup>

What Bradley thought "probable" was in fact the uncontroverted view of the Framers that Act and amendment were "identical."<sup>119</sup> So much for history.

Observing that "'Democracy' means government by the people, either directly or through representation," Sandalow asks, "why, in a nation generally committed to democratic values, a minority should have a special claim to promote its interests outside the political process."<sup>120</sup> Madison considered that the diverse interest of parties and interests would guard against the "tyranny of the majority."<sup>121</sup> Justice Stone cautioned against the "tyranny of the minority,"<sup>122</sup> and Bridwell justly asks, "what makes the tyranny of the minority — the judiciary or those they favor — better than the tyranny of the majority?"<sup>123</sup> Certainly the Founders did not contemplate that the tail might wag the dog; for them "individual rights, even the basic civil liberties that we consider so crucial, possessed little of their modern theoretical relevance when set against the will of the people."<sup>124</sup> Like Elbridge Gerry, they

118. *Livestock Dealers & Butchers Assn. v. Crescent City Livestock & Slaughter House Co.*, 15 F. Cas. 649, 655 (1870) (No. 8, 408). The four dissenters in the *Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 96 (1872), led by Justice Field, replied to the question, "[w]hat then are the privileges and immunities which are secured against abridgment by State legislation?" "In the first section of the Civil Rights Act [of 1866] Congress has given its interpretation to these terms [which] . . . include the right 'to make and enforce contracts [etc.]"

119. For citations, see R. BERGER, *supra* note 29, at 23, 43.

120. Sandalow, *supra* note 42, at 1163.

121. THE FEDERALIST, No. 10 at 61 (Mod. Lib. ed. 1937); see also *id.* No. 51 at 339. An activist, Dean Carl Auerbach, wrote, "the 'monolithic' majority . . . does not exist; the majority is but a coalition of minorities which must act in a moderate, broadly representative fashion to preserve itself." Quoted in Sandalow, *supra* note 42, at 1191. Sandalow also quotes the philosopher Sidney Hook's view that "the dictatorship of the majority [is a] bugaboo which haunts the books of political theorists but has never been found in the flesh in modern history." *Id.*

122. "The experience of the past one hundred and fifty years has revealed the danger that, through judicial interpretation, the constitutional device for the protection of minorities from oppressive majority action, may be made the means by which the majority is subjected to tyranny of the minority." A.T. MASON, *HARLAN FISKE STONE: PILLAR OF THE LAW* 331 (1956).

123. Bridwell, *supra* note 68, at 654. "Minority tyranny occurs if the majority is prevented from ruling where its power is legitimate." Bork, *supra* note 35, at 3; see note 111 *supra*.

124. G. WOOD, *supra* note 91, at 63. He adds, "it was conceivable to protect the common law liberties of the people against their rulers, but hardly against the people themselves." *Id.*

relied "on the Representatives of the people [not the courts] as the guardians of their Rights and Interests."<sup>125</sup>

### *Was Activist Power Conferred?*

Academics discuss judicial activism largely in empirical terms, neglecting the core issue: did the Constitution confer "untethered" discretion<sup>126</sup> on the courts. Some argue that the Framers issued an "invitation" to judges to revise the Constitution,<sup>127</sup> or that they made judges their "surrogate" for the purpose of keeping the Constitution up to date.<sup>128</sup> Or they assume that "we" have "entrusted to them the task of framing a new ideology" to which the people are to conform, suavely postulating that their own cloistered views represent those of the citizenry<sup>129</sup> who, of course, have not been consulted. Brest falls into no such snares; he argues that judicial activism is justified by the special "competence" of judges of which inescapably they themselves are to be the judge. Expertise does not create power.

Very different was the original design. Brest notes that the bulk of the Constitution "is constitutive — establishing and marking the boundaries of government entities,"<sup>130</sup> or as Marshall said, limiting and defining the several powers.<sup>131</sup> Of the three departments, Hamilton assured the Ratifiers, the judiciary "is next to nothing," and he left no doubt as to the limited scope of judicial power.<sup>132</sup> That had been

125. 1 M. FARRAND, *supra* note 3, at 97-98.

126. The word is Ely's, *supra* note 42, at 403; see also note 47 *supra*.

127. "Vague and uncertain laws, and more especially Constitutions, are the very instruments of Slavery." SAMUEL ADAMS, WRITINGS 262 (H. Cushing ed. 1904). An ardent activist, Professor Charles L. Black, noted the colonists' conception that "[l]aw is a body of existing and determinate rules," which "is to be ascertained" by the judges by consulting "statutes, precedents and the rest," and that "the function of the judge was thus placed in sharpest antithesis to that of the legislator," who alone was concerned "with what the law ought to be." C. BLACK, THE PEOPLE AND THE COURT 160 (1960).

128. Lusk, *supra* note 44, at 21. Justice Black, the quondam darling of egalitarians, dismissed "rhapsodical strains, about the duty of the Court to keep the Constitution in tune with the times. . . . The Constitution makers knew the need for change and provided for it." *Griswold v. Connecticut*, 381 U.S. 479, 522 (1965) (dissenting opinion).

129. See note 75 *supra*.

130. Brest, *supra* note 1, at 237 n.124.

131. See text accompanying note 17 *supra*.

132. THE FEDERALIST, No. 78 at 504 (Mod. Lib. ed. 1937). For example, there "is no liberty, if the power of judging be not separated from the legislative and executive powers," *id.*; the courts may not "on the pretense of a repugnancy . . . substitute their own pleasure to the constitutional intentions of the legislature," *id.* at 507; "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents . . ." *id.* at 510. And he assured the Ratifiers in No. 81, *id.* at 526-27, that judges could be impeached for "deliberate usurpations on the authority of the legislature."

articulated by Montesquieu, the oracle of the Founders: "The national judges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or vigour."<sup>133</sup> Responding to the views of Elbridge Gerry and others that judges were not especially qualified to judge policy, the Framers excluded them from participation in the legislative process.<sup>134</sup> Justice Iredell, one of the foremost proponents of judicial review, reiterated that within their constitutional boundaries, legislatures were not controllable by judges.<sup>135</sup>

Activists like Professor Stanley Kutler argue, however, that "[j]udicial policymaking fills a vacuum created when politically accountable legislators . . . abdicate their proper policy role."<sup>136</sup> But the Supreme Court held "it is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to . . . the judicial branch."<sup>137</sup> Discretion when to exercise a power is vested in the

133. 1 C. MONTESQUIEU, *THE SPIRIT OF LAWS* 206, Book XI, ch. 6 (4th ed. 1768, printed by A. Donaldson).

134. For discussion see R. BERGER, *supra* note 29 at 300-03.

135. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 266 (1796). In one of the landmark cases to assert the power of judicial review, *Kemper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 47 (1973), Judge Henry declared:

The judiciary, from the nature of the office . . . could never be designed to determine upon the equity, necessity, or usefulness of a law; that would amount to an express interfering with the legislative branch. . . . [N]ot being chosen immediately by the people, nor being accountable to them . . . they do not, and ought not, to represent the people in framing or repealing any law."

Speaking for a unanimous Court, Justice Field held, "[w]hen once it is established that Congress possesses the power to pass an act, our province ends with its construction. . . . [T]he province of the courts is to pass upon the validity of laws, not to make them . . ." *The Chinese Exclusion Case*, 130 U.S. 581, 603 (1889). Judicial review, Judge Learned Hand wrote, "should be confined to occasions when the statute or order was outside the grant of power to the grantee, and should not include a review of how the power has been exercised." *L. HAND, THE BILL OF RIGHTS* 66 (1962).

136. Kutler, *supra* note 22, at 523.

137. *Buckley v. Valeo*, 424 U.S. 1, 121-22 (1976). A constitutional power may not be "abdicated". *United States v. Morton Salt Co.*, 338 U.S. 632, 647 (1950).

Professor Gerald Gunther rejected "the view that courts are authorized to step in when injustices exist and other institutions fail to act. That is a dangerous — and I think illegitimate — prescription for judicial action." Gunther, *Some Reflections on the Judicial Role: Distinctions, Routes and Prospects*, 1979 WASH. U.L.Q. 817, 825.

In the First Congress, Madison particularized that the design of the separation of powers was that the "Judicial [branch] shall [never] exercise the powers vested in the Legislative or Executive Departments." 1 ANNALS OF CONG. 435-36 (Gales & Seaton ed. 1836, print bearing running title "History of Congress"). One of the Framers, Charles Pinckney, said in the House of Representatives in 1798, that they intended that "the powers of Government should be distributed among the different departments, and that they ought not to be assigned or relinquished." 3 M. FARRAND, *supra* note 3, at 376.



branch to whom the power is confided.<sup>138</sup> All the greater is the breach when courts take over legislative power because the legislature or the people have failed to exercise it.

### *Power to Amend*

Brest grapples with the "central problem" posed for his position by the fact that the Constitution furnishes the machinery for change; he recognizes that "the amending power . . . is a vital element in the constitutional scheme." But he argues that "the absence of an amendment [cannot] be taken as popular consent to the Constitution,"<sup>139</sup> rephrasing his call for recurrent consent to the Constitution. Of course, if the absence of such "consent" deprives the Constitution of binding force, the amendment provision dies with it. But if it remains alive, where does he derive power to set aside the exclusive provision for amendment by the people pursuant to article V? To dispose of article V, Brest first argues that "the formal process of amendment is *too cumbersome*,"<sup>140</sup> an argument not the less amazing because so oft repeated:<sup>141</sup> compliance with the law is excused if it is "too cumbersome." By such logic a burglar may justify that he broke in through a window because the door was locked. Brest observes that "to hold that a purpose of our Constitution is to protect individual rights . . . is to concede that there will be times when no majority, let alone a super-majority [three-fourths of the States] will adequately protect these rights."<sup>142</sup> So far as "rights" are embodied in the Constitution, judicial "protection" is authorized. But Brest would set article V aside so that judges may provide protection for new rights that have no constitutional sanction and cannot win the "consent" of the people.<sup>143</sup> A

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138. See note 135 *supra*; *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 515 (1840); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 169-70 (1803).

139. Brest, *supra* note 1, at 236.

140. *Id.* (emphasis added). Justices Douglas and Black declared that "[t]he temptation of many men of good will is to cut corners, take short cuts, and reach the desired end regardless of the means." *Hannah v. Larche*, 363 U.S. 420, 494 (1960).

141. McDougal & Lans, *Treaties and Congressional Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 184, 293 (1945); because "the process of amendment is *politically difficult*, other modes of change have emerged." (Emphasis added). Insisting on rigorous compliance with the mechanics of article V, the Supreme Court held, "it is not the function of the courts or [legislatures] . . . to alter the method which the Constitution has fixed." *Hawke v. Smith*, 253 U.S. 221, 227 (1920).

142. Brest, *supra* note 1, at 237.

143. See text accompanying note 109 *supra*. Professor Joseph W. Bishop stated: "Those who favor abortion, busing . . . and who oppose capital punishment . . . obviously have no faith whatever in the wisdom of the will of the great majority of the people, who are

corollary to Brest's argument is that if "adjudication is to perform the functions" he assigns to it, "its growth must proceed more incrementally," as "in fact [it] has."<sup>144</sup> In other words, courts must perforce amend the Constitution if they are to perform their unconstitutional function, and they have done so, the apotheosis of boot-strapping. On the other-hand, Chief Justice Marshall, the putative father of judicial review, disclaimed power "to change that instrument."<sup>145</sup>

So far as the Constitution still remains alive and well, the applicable gloss was furnished by Hamilton in Federalist No. 78:

Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it, prior to such an act.<sup>146</sup>

Mark that Hamilton left no room for judicial diviners. The "solemn and authoritative act" to which he referred is amendment through the machinery of article V, the sole constitutional mechanism for change. For this exclusivity we need go no further than Washington:

If in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed.<sup>147</sup>

As a clincher, Brest asks, "suppose that tomorrow it were demonstrated . . . that the adopters intended to limit the [equal protection]

opposed to them. They are doing everything possible to have these problems resolved by a small minority in the courts and the bureaucracy." Bishop, *What is a Liberal — Who is a Conservative?*, 62 COMMENTARY 47 (September, 1976).

144. Brest, *supra* note 1, at 236.

145. JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 209 (G. Gunther ed. 1969).

146. THE FEDERALIST, No. 78 at 509 (Mod. Lib. ed. 1937).

147. 35 G. WASHINGTON, WRITINGS 228-229 (J. Fitzpatrick ed. 1940). Justice Story wrote that if a constitutional restriction "be mischievous, the power of redressing the evil lies with the people by an exercise of the power of amendment. If they choose not to apply the remedy, it may fairly be presumed the mischief is less than what would arise from a further extension of the power, or that it is the least of two evils." 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 426 at 325 (5th ed. 1905). And he wrote, "a departure from the true import and sense of its powers is *pro tanto* the establishment of a new constitution. It is doing for the people what they have not chosen to do for themselves. *Id.*

clause to a narrow range of racially discriminatory practices: Would many decades of moderate originalist doctrine become retroactively misguided?"<sup>148</sup> Thus Brest attaches to the Warren Court's decisions of the 1950s and 1960s a binding force that he refuses the 200-year-old Constitution.<sup>149</sup> But Justices Holmes and Brandeis held that the 100-year-old *Swift v. Tyson* constituted "an unconstitutional assumption of power by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct."<sup>150</sup>

### *The Original Intention*

Activists strenuously seek to discredit resort to the "original intention"<sup>151</sup> because it squarely contradicts the Warren Court's desegregation and reapportionment decisions. Unlike Brest, I did not undertake a dissertation on the general subject of interpretation, but singled out one aspect which bears on the scope of the fourteenth amendment, whereunder the courts have been swamped with litigation.<sup>152</sup> My core thesis, and I refer to it because at a number of points Brest calls attention to Berger's cloven hoof,<sup>153</sup> was that the framers of the amendment *unmistakably excluded* suffrage from its scope, a position Brest labels as "moderate originalist"; for such the "sources are conclusive *when they speak clearly*."<sup>154</sup> When, however, he turns to me, he aligns me with the "strict intentionalists," who "determine how the adopters *would have* applied a provision to a given situation . . . ."<sup>155</sup> I am no soothsayer; and given the clear exclusion of suffrage there was no occasion to consider how the Framers "would have applied" a non-existent provision. That they excluded suffrage Brest now admits.<sup>156</sup> And he recognized that "the nation was not ready to

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148. Brest, *supra* note 1, at 232. This is tantamount to holding that "the Court's claim to power is *fait accompli*; it is unrealistic to presume it reversible." Bridwell, *supra* note 68, at 632.

149. Where Brest is horrified by a challenge to Warren's desegregation decision, see text accompanying notes 195-97 *infra*, he frivolously comments that to rely "on originalist sources," e.g. the Constitution which admittedly is the "civil religion" of the people, "is rather like having a remote ancestor who came over on the Mayflower." Brest, *supra* note 1, at 234.

150. *Erie Ry. Co. v. Tompkins*, 304 U.S. 64, 79 (1938).

151. See Alfange, *supra* note 63. Arthur S. Miller scornfully dismisses the "intention of the Framers" as a "filio-pietistic notion." Miller & Howell, *supra* note 99, at 683. For critique of Miller, see Bridwell, *supra* note 68, at 639-41; Berger, *Comment on Professor Miller's Essay*, 6 HASTINGS CONST. L.Q. 576-89 (1979).

152. R. BERGER, *supra* note 29, at 1.

153. See text accompanying notes 195, 197, 202, 207, 209-10, 213, 217, 221 *infra*.

154. Brest, *supra* note 1, at 229 (emphasis added).

155. *Id.* at 231, 222 (emphasis added).

156. See text accompanying notes 203-05 *infra*.

eliminate ['school segregation'] in the 1860's."<sup>157</sup> All this is incompatible with his assertion that "strict intentionalism produces a highly unstable constitutional order. The *claims* of . . . Raoul Berger demonstrate that a *settled* constitutional understanding is in perpetual jeopardy of being overturned by new light on the adopters' intent . . . ."<sup>158</sup> It needed no "new light" to lead the Warren Court to "overturn" precedents that had been "settled" for 100 years.<sup>159</sup> Better the prevailing false light (one person-one vote), "settled" in 1962, than the true facts which he himself concedes! Can what he has himself discovered be dismissed as "questing after a chimera"?<sup>160</sup> Despite the philosophical generalization "we can never understand the past in its own terms," he fully understands that suffrage was excluded by the Framers.<sup>161</sup> How fares Brest's "indeterminate and contingent nature of the historical understanding"<sup>162</sup> in the face of this "irrefutable" fact?

Traditionally, as Brest notes, the Constitution has been viewed as "the supreme law of the land. The Constitution manifests the will of the sovereign citizens of the United States — 'we the people' assembled in the conventions and legislatures that ratified the Constitution and its amendments. The interpreter's task is to ascertain their will." This he calls "originalism";<sup>163</sup> and it may be added that the canon "[t]he intention of the lawmaker is the law" goes back six or seven hundred years.<sup>164</sup> Because I bow to that "will" I am an "originalist";<sup>165</sup> and I shall now examine some of Brest's objections to reliance on the original intention.

We cannot assume, he maintains, that a constitutional term was "used as a term of art" because though the several Conventions "included many lawyers, the vast majority of participants were laypersons, and it cannot simply be assumed that they used the phrase

157. Brest, *supra* note 54. Nevertheless, his final sentence: "To put it bluntly, one can better protect fundamental values and the integrity of democratic process by protecting them than by guessing how other people meant to govern a different society a hundred or more years ago." Brest, *supra* note 1, at 238 (emphasis added). The "fundamental values", i.e. the Framers' exclusion of suffrage and segregation, were removed from "guessing" by Brest's own admission. Only in Brest's surrealistic world is the reversal of those values "protecting them."

158. Brest, *supra* note 1, at 231 (emphasis added).

159. See notes 22 & 23 *supra*.

160. Brest, *supra* note 1, at 222.

161. *Id.* at 221; see text accompanying notes 203 & 205 *infra*.

162. *Id.* at 222.

163. *Id.* at 204.

164. *Hawaii v. Mankichi*, 190 U.S. 197, 212 (1903).

165. Almost 40 years ago I refused to make my predilections the test of constitutionality. Berger, *Constructive Contempt: A Post Mortem*, 9 U. CHI. L. REV. 602 (1942).

in its technical sense."<sup>166</sup> Laymen, however, turn to lawyers for drafting documents of legal consequence, for example, deeds, conveyances. Laymen had relied on lawyers for the Declaration of Independence, and sent them to the several Conventions. Are we to discard the common law meaning of habeas corpus, bills of attainder, ex post facto, due process, because laymen preponderated? The Supreme Court's practice from the beginning has been to the contrary.<sup>167</sup> Brest himself attaches importance to "term[s] of art that [had] been largely . . . in the control of an elite professional group."<sup>168</sup> His doubts were not shared by the Court:

The statesmen and lawyers of the Convention . . . were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary . . . . [W]hen they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law, confident that they could be shortly and easily understood.<sup>169</sup>

Somewhat different problems are posed by terms which had no fixed meaning, for example, "equal protection." Here we need to ask, what meaning did the Framers attach to the words.<sup>170</sup> Brest argues that

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166. Brest, *supra* note 1, at 206 n.11. On the other hand, the Supreme Court, per Justice Harlan, stated: "[W]e should not assume that Congress . . . used the words 'advocate' and 'teach' in their ordinary dictionary meanings when they had already been construed as terms of art carrying a special and limited connotation." *Yates v. United States*, 354 U.S. 298, 319 (1957).

167. For citations see Berger, *Bills of Attainder: A Study of Amendment by the Court*, 63 CORNELL L. REV. 355, 361-64 (1978).

168. Brest, *supra* note 1, at 208 n.21.

169. Ex parte Grossman, 267 U.S. 87, 109 (1925). To the same effect, *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391 (1978), per Chase, J.: "The expressions 'ex post facto laws' are technical, they had been in use long before the Revolution, and had acquired an appropriate meaning by Legislators, Lawyers and Authors." As Chief Justice Marshall wrote of "treason," "it is scarcely conceivable that the term was not employed by the framers of our Constitution in the sense which had been affixed to it by those from whom we borrowed it." *United States v. Burr*, 25 F. Cas. 55, 159 (C.C. Va. 1807) (No. 14693).

170. Justice James Wilson, a leading architect of the Constitution wrote that "[t]he first and governing maxim in the interpretation of a statute is, to discover the meaning of those, who made it." 1 THE WORKS OF JAMES WILSON 75 (McCloskey ed. 1967). He was echoed by Justice Story. 1 J. STORY, *supra* note 147, at § 400. That view had been enunciated by Thomas Rutherford in 1756. For this and other citations, see R. BERGER, *supra* note 29, at 366. In our own time, Justice Holmes wrote: "Of course, the purpose of written instruments is to express some intention or state of mind of those who write them, and it is desirable to make that purpose [effective]. . . ." O. HOLMES, COLLECTED LEGAL PAPERS 206 (1920).

To escape the grip of this canon, activists maintain that rules of statutory construction are inapplicable to interpretation of the Constitution. But Justice Story commended the sections on statutory interpretation in Matthew Bacon's Abridgment and Rutherford. 1 J. STORY, *id.* at §§ 400, 403 at 305, 307. For citations to similar views by

"[t]he practice of statutory interpretation from the 18th through at least the mid-19th century suggest that the adopters assumed . . . a mode of interpretation that was more textualist than intentionalist."<sup>171</sup> Given ambiguous provisions, however, English judges from a very early date looked to contemporaneous constructions, to the mischief to be cured,<sup>172</sup> and other extrinsic circumstances, for the meaning of the draftsmen. True it is they did not look to "legislative debates" for the reason, first, that such records were very late aborning, and second, because they were deemed inconclusive. That some records are inconclusive is poor reason for barring those which are unequivocal. Since the basic principle is to give effect to the legislative intention, it is "arbitrary and unprincipled"<sup>173</sup> to reject the best evidence — the legislators' own unmistakable record. Brest observes, it is "hard to imagine . . . the Court changing the number of Senators allocated to each State other than by constitutional amendment."<sup>174</sup> By what logic should be unmistakable intention to allocate two Senators to each state be differentiated because not textually expressed? To the contrary, Justice

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Edward Corwin, Julius Goebel, Harry W. Jones, see BERGER, *Judge Gibbons Argument Ad Hominem*, 59 B.U.L. REV. 783, 805 (1979).

It is symptomatic of Brest's one-sided version that he should ask, "[w]hat did the words 'privileges and immunities,' 'due process,' 'equal protection of the laws,' 'citizen,' and 'person' mean to those who adopted them in 1868," citing 1890 and 1926 articles dealing with the meaning of "liberty" in the fifth and fourteenth amendments, Brest, *supra* note 1, at 209, while ignoring the lengthy three chapters I devoted to the very question he asks.

171. Brest, *supra* note 1, at 215.

172. The roots of contemporaneous construction go deep. In 1454, Chief Justice Prisot declared, "the judges who gave these decisions in ancient times were nearer to the making of the statute than we now are, and had more acquaintance with it." Windham v. Felbridge, Y.B. 33 Hen. VI f.38, 41, pl. 17 (quoted in C. K. ALLEN, *LAW IN THE MAKING* 193 (6th ed. 1958)). See also *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 290 (1827).

"Under principles coming down to us from Heydon's Case [76 E.R. 638 (1584)], a court . . . must endeavor to appreciate the mischief the framers were seeking to alleviate." Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 943 (1965).

173. This is how Brest brands the Court's straying from the true path, see text accompanying note 97 *supra*.

174. Brest, *supra* note 1, at 238 n.124. Brest explains his "Senator" example, not on the basis of an "a priori . . . timeless principle" but on the ground that "a presumption of fidelity to the text and original understanding is very unlikely to be rebutted." *Id.* (emphasis added). Of course, the text stands highest when it faithfully reflects the original understanding. But what if the text is rebutted by the original understanding. A simpler explanation is that normally men are taken to mean what they say; they do not, however, use words to defeat their purposes. As Madison wrote, "it exceeds the possibility of belief, that the known advocates in the Convention for a jealous grant and certain definition of federal powers, should have silently permitted the introduction of words or phrases in a sense rendering fruitless the restrictions and definitions elaborated by them." 3 M. FARRAND, *supra* note 3, at 488. Having clearly excluded suffrage, the Framers did not mean to nullify that intention by the words "equal protection", as Brest now admits. See text accompanying note 203 *infra*.

Holmes held that when a legislature "has intimated its will, however indirectly, that will should be recognized and obeyed . . . . [I]t is not an adequate discharge of duty for courts to say: 'We see what you are driving at, but you have not said it . . . .'"<sup>175</sup>

Whatever the practice at "mid-nineteenth century," we have some facts respecting "the canons by which the adopters intended their provisions to be interpreted"<sup>176</sup> which make resort to that practice redundant. In the midst of the session that was framing the fourteenth amendment, Senator Charles Sumner, well aware that the great majority of the Senate opposed his extreme abolitionist views, yet stated that if the meaning of the Constitution "in any place is open to doubt, or if words are used which seem to have no fixed signification [*e.g.*, equal protection], we cannot err if we turn to the framers; and their authority increases in proportion to the evidence which they have left on the question."<sup>177</sup> This was confirmed by confreres who also sat in the 39th Congress.<sup>178</sup> And such views were summarized in 1872 by a "unanimous Senate Judiciary Committee report, signed by Senators who had voted for the Thirteenth, Fourteenth, and Fifteenth Amendments in Congress,"<sup>179</sup> the subject being the fourteenth amendment:

A construction which should give the phrase . . . a meaning differing from the sense in which it was understood and employed by the people when they adopted the Constitution, would be as unconstitutional as a departure from the plain and express language of the Constitution in any other particular. This is the rule of interpretation adopted by all commentators on the Constitution, and in all judicial expositions of that instrument.<sup>180</sup>

Here we have the best sort of "contemporaneous construction" of the interpretive canon by which the "adopters intended their provisions to be interpreted."

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175. *Johnson v. United States*, 163 F. 30, 32 (1st Cir. 1908) (quoted in Keifer & Keifer v. RFC, 306 U.S. 381, 391 n.4 (1939)).

176. Brest, *supra* note 1, at 215; Brest states that the first task of an intentionalist is to determine what those canons are. *Id.*

177. CONG. GLOBE, 39th Cong., 1st Sess. 677 (1866).

178. John Farnsworth of Illinois, who participated in the 1866 debates, said of the fourteenth amendment: "Let us see what was understood to be its meaning at the time of its adoption by Congress." CONG. GLOBE, 42d Cong., 1st Sess. app. 115 (1871). James Garfield, another participant, rejected an interpretation of the amendment that went "beyond the intent of those who framed and those who amended the Constitution." *Id.* at app. 152. For additional citations, see Berger, *The Fourteenth Amendment: Light From the Fifteenth*, 74 NW. U.L. REV. 311, 358 n.283 (1979).

179. A. AVINS, *THE RECONSTRUCTION AMENDMENTS DEBATES* ii (1967).

180. S. REP. NO. 21, 42d Cong., 2d Sess. 2 (1872), reprinted in A. AVINS, *supra* note 179, at 571-72.

"[F]ew if any intentionalist interpreters," Brest argues, "actually attempt to count the intention-votes of the adopters of statutory and constitutional provisions."<sup>181</sup> Weigh this against the facts regarding suffrage, of which I shall set out the barest skeleton. Justice Brennan observed that "17 of 19" northern states had rejected black suffrage between 1865-1868.<sup>182</sup> Consequently, Roscoe Conkling, a member of the Joint Committee on Reconstruction of both Houses, which drafted the fourteenth amendment, stated it would be "futile to ask three quarters of the States to do . . . the very thing which most of them have already refused to do . . . ."<sup>183</sup> Another member of the Committee, Senator Jacob Howard, who explained the amendment to the Senate, said that "three-fourths of the States . . . could not be induced to grant the right of suffrage, even in any degree or under any restriction to the colored race."<sup>184</sup> The chairman of the Joint Committee, Senator William Fessenden, said of a suffrage proposal that there is not "the slightest possibility that it will be adopted by the States."<sup>185</sup> The debates are stuffed with similar utterances.<sup>186</sup> The Report of the Joint Committee confirmed that the States would not surrender "a power they had always exercised, and to which they were attached," and therefore it was concluded to "leave the whole question with the people of each State."<sup>187</sup> Courts regard statements by the Committee, its chairman and members as convincing evidence of legislative intent.<sup>188</sup> These statements are confirmed by a remarkable fact. During the pendency of ratification, radical opposition to readmission of Tennessee because its constitution excluded Negro suffrage was voted down in the House by 125 to 12.<sup>189</sup> A similar proposal by Senator Sumner was rejected 34 to 4.<sup>190</sup> Such a "count" should satisfy even Brest. More importantly, it reflected the will of the people: "Negro voting in the North," Professor William Gillette wrote, "was out of the question."<sup>191</sup>

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181. Brest, *supra* note 1, at 213.

182. *Oregon v. Mitchell*, 400 U.S. 112, 255-56 (1970).

183. CONG. GLOBE 39th Cong., 1st Sess. 358 (1866).

184. *Id.* at 2766.

185. *Id.* at 704.

186. See R. BERGER, *supra* note 29, at 30-31, 58-74.

187. REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, 39th Cong., 1st Sess. (undated) xiii (1866).

188. *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 125 (1942); *Union Starch & Refining Co. v. NLRB*, 186 F.2d 1008, 1012 (7th Cir. 1951).

189. CONG. GLOBE, 39th Cong., 1st Sess. 3980 (1866).

190. *Id.* at 4000. Sumner's proposal "that all persons were 'equal before the law, whether in the courtroom or at the ballot box' received 8 yeas to 39 nays." 6 C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1264 (1972).

191. W. GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT 32 (1965). "The off-year state elections of 1867," during which ratification of



*Brest as Critic*

Scholars command respect because they are thought to be disinterested, to stand above the battle. "My colleagues," said Thomas Huxley at the height of the establishment's campaign to discredit Darwin's "monkey" theory, "have learned to respect nothing but evidence, and to believe that their highest duty lies in submitting to it, however it may jar against their inclinations."<sup>192</sup> Instead, Brest bends facts to fit his preconceptions; and in his zeal for minority "rights" disparages those who insist that benign purposes do not confer constitutional power. He cannot conceive that a disinterested commitment to the integrity of the Constitution and the judicial process stand no lower than his attachment to extra-constitutional social reform. No one would gather from his pages that there is a legitimate challenge to what Professor Philip Kurland termed "the usurpation by the judiciary of general governmental powers on the pretext that its authority derives from the Fourteenth Amendment,"<sup>193</sup> a take-over that Brest would justify on the ground that the judges are especially "competent" to ascertain "fundamental values." Because his deeply-etched bias vitiates his scholarly credibility, it merits discussion.

In considerable part, his article seeks to escape from my central thesis: the Court is not empowered to reverse the unmistakable intention of the Framers. The vast bulk of my historical documentation was devoted to the exclusion of suffrage from the fourteenth amendment. By way of cumulative evidence, I devoted a slender chapter to the similar exclusion of segregation. Brest acknowledged that "the nation was not ready to eliminate [school segregation] in the 1860's."<sup>194</sup> Nevertheless he entitled his influential New York Times review "Berger v. Brown, et al", explaining that "excluding apologists for racism, Berger is almost alone in arguing that the Court erred in Brown v. Board of Education — the 1954 case that struck down laws forbidding black and white children to attend the same schools."<sup>195</sup> "Excluding apologists for racism" is a nice touch, worthy of Senator McCarthy's

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the fourteenth amendment was debated, "made clear the popular hostility to black suffrage in the North." M. KELLER, *AFFAIRS OF STATE* 81 (1977).

192. T. HUXLEY, *MAN'S PLACE IN NATURE* (1863) (quoted in H. SMITH, *MAN AND HIS GODS* 372 (1953)). Activists forget that "disinterested curiosity is the life-blood of real civilization." G. TREVELYAN, *ENGLISH SOCIAL HISTORY* 10 (1942).

193. Letter to Harvard University Press, August 15, 1977.

194. Brest, *supra* note 54.

195. *Id.*

"guilt by association."<sup>196</sup> Doctrinal purity is not satisfied by mere refutation — the dissident must be put beyond the pale.

Since, however, the lion's share of my discussion was devoted to suffrage, that should be the litmus test of my reliability. Brest did not directly mention suffrage in his review, but maintained that Berger's "presentation of the data" was "persistently distorted to support his thesis." He charged me with a "simplistic and myopic argument," with "some fancy footwork against the text and historical understanding," instancing the *Court's* reliance for its "race discrimination cases" on the "equal protection clause."<sup>197</sup> Why Brest should make me his whipping boy, when I merely confirmed the conclusion of his "beloved mentor," Justice John Marshal Harlan,<sup>198</sup> passes all understanding. Harlan reminded the Court in *Griswold v. Connecticut* that the reapportionment decisions were "made in the face of irrefutable and still unanswered history to the contrary,"<sup>199</sup> mustered by him in *Reynolds v. Sims*.<sup>200</sup> Half a dozen activist commentators agree.<sup>201</sup> Where Brest earlier relied on the "sweeping language" of the "equal protection clause," and flailed me with "our legal commitment to racial equality,"<sup>202</sup> he now admits that "the adopters of the equal protection clause probably intended it not to encompass voting discrimination at all,"<sup>203</sup> still less school segregation.<sup>204</sup> And he now concedes that "[t]he

196. Edmund Wilson called this "the bed-fellow line of argument, which relies on producing the illusion of having put you irremediably in the wrong by associating you with some odious person who holds a similar opinion." E. WILSON, *EUROPE WITHOUT A BAEDEKER* 154 (1966).

197. Brest, *supra* note 54, at 11, 44.

198. So his case book is dedicated, *see* note 20 *supra*.

199. 381 U.S. 479, 501 (1965).

200. 377 U.S. 533, 595-608 (1964) (Harlan, J., dissenting). *See also* *Oregon v. Mitchell*, 400 U.S. 112, 154-67 (1970) (Harlan, J., dissenting). For my tribute to these dissents, *see* R. BERGER, *supra* note 29, at 54.

201. Nathanson, *Constitutional Interpretation of the Democratic Process*, 56 TEX. L. REV. 579, 581 (1978); Lusky, "Government by Judiciary": What Price Legitimacy?, 6 HASTINGS CONST. L.Q. 403, 406 (1979); Abraham, *supra* note 44, at 468; Mendelson, *Raoul Berger's Fourteenth Amendment — Abuse by Contraction v. Abuse by Expansion*, 6 HASTINGS CONST. L.Q. 437, 452, 453 (1979); Alfange, *supra* note 63, at 622; Perry, *supra* note 63, at 687.

202. Brest, *supra* note 54.

203. Brest, *supra* note 1, at 234 n.115. But he remains unhappy about the equal protection clause, for he obliquely deplores any argument "that almost every twentieth century equal protection clause decision is inconsistent with the original understanding of the fourteenth amendment. . . ." *Id.* at 232 n.108. Consider too Brest's concession that "because of its indeterminacy, the [equal protection] clause does not offer much guidance even in resolving particular issues of discrimination based on race", *id.* at 232, a veritable dream of "untethered" discretion. Leedes, *supra* note 15, at 1420, states "no one knows yet what the Court's standard is in equal protection clause causes," the very model of an activist heaven.

adopters would probably have disapproved of all of the Court's modern voting rights decisions. . . ."<sup>205</sup> Its intervention in state criminal administration is no less questionable, for it must always be remembered that the tenth amendment raises a presumption that no more is surrendered than is expressed or necessarily implied.<sup>206</sup> Yet Brest has the gall to summon for his "sense of the elusiveness of the original understanding" Berger's "controversial" argument "that almost . . . all the Supreme Court's decisions under the fourteenth amendment are incorrect,"<sup>207</sup> echoing his earlier demagogic invocation of *Brown*. Worse, though the Framers' admitted exclusion of suffrage and segregation stared him in the face, he transmuted the "equal protection clause" into the embodiment of "an ideal — of racial equality,"<sup>208</sup> twisting the facts to his own preconceptions.

His manner of evaluating the "controversy" again exhibits his inveterate one-sidedness: he cites unfavorable reviews by Stanley Kutler, Walter Murphy and Aviam Soifer, with a "But see" to Michael Perry.<sup>209</sup> Undeniably Brest's activist brethren shared his horror of a challenge to the desegregation and reapportionment decisions, though it is a canon of scientific inquiry that no opinion is sacrosanct, no doctrine is shielded from reexamination. But Brest, who upbraided me for allegedly collecting "quotations more or less favoring [my] view,"<sup>210</sup> employs a double standard in ignoring my painstaking refutation of his

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204. Bickel wrote to Justice Frankfurter:

It was preposterous to worry about unsegregated schools, for example, when hardly a beginning had been made at educating Negroes at all and when obviously special efforts, suitable only for Negroes would have to be made. . . . It is impossible to conclude that the 39th Congress intended that segregation be abolished; impossible also to conclude that they foresaw it might be, under the legislation they were adopting."

Quoted in R. KLUGER, *SIMPLE JUSTICE* 654 (1976). See also R. BERGER, *supra* note 29, at 117-33.

Opposition to desegregation was even more intense than to suffrage. Sumner could not get school desegregation into the Civil Rights Act of 1875, which provided for equal accommodation in inns, theaters and public conveyances. Berger, *The Fourteenth Amendment: Light From the Fifteenth*, 74 Nw. U. L. REV. 311, 328-29 (1979).

205. Brest, *supra* note 1, at 234.

206. "The government . . . can claim no powers which are not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816). Brest observes that "a supra-constitutional expansion of Congress' power under article I would be contra-constitutional under the tenth amendment," Brest, *supra* note 1, at 235, and by the same token under the fourteenth.

207. Brest, *supra* note 1, at 219.

208. Brest, *supra* note 54.

209. Brest, *supra* note 1, at 219 n.55.

210. Brest, *supra* note 54, at 44.

activist fellows.<sup>211</sup> Nor is Perry alone in perceiving that I have raised questions that call for serious reconsideration of activist assumptions.<sup>212</sup> Compare, too, Brest's charge that "in lieu of reasoned argument" Berger is guilty of "brief parodies of opposing theories"<sup>213</sup> with my forty-two page analysis of Van Alstyne's critique of Justice Harlan, with my seventeen-page analysis of Bickel's "open-ended" theory, which another activist considers I "devastated."<sup>214</sup> If we may judge by his own article, Brest himself no longer places his trust in the "most broadly worded guarantees"<sup>215</sup> of the amendment; in particular, he concedes with respect to the "open-ended" text of the "equal protection" clause that the Framers' "resolution was probably contrary to the Court's."<sup>216</sup> Thus my

211. See Berger, *Comment on Professor Stanley I. Kutler's Essay*, 6 HASTINGS CONST. L. Q. 590 (1979); Berger, *The Scope of Judicial Review and Walter Murphy*, 1979 WIS. L. REV. 341. For my comments on Soifer, see Berger, *Soifer to the Rescue of History*, 32 S. CAR. L. REV. 427 (1981).

To the activist it is not important whether criticism is well founded; it suffices that it is aimed at Berger. So, though Brest's recognition that the framers excluded suffrage and segregation from the fourteenth amendment is at war with Soifer's all-out 55 page attack on my historical competence, Soifer is nonetheless cited as an authority.

Similarly, Brest cites Professor William Van Alstyne's critique of Justice Harlan's demonstration that suffrage was excluded but ignores my detailed examination of Van Alstyne's analysis, hardly a tribute to a "beloved mentor." R. BERGER, *supra* note 29, at 69-84, 419-27. Van Alstyne himself, however, commends an author who is "often at pains to give the strongest arguments on both sides. . . ." Van Alstyne, Book Review, 57 TEX. L. REV. 1489, 1492 (1979) (emphasis added).

212. "Berger effectively destroys whatever might have remained of the notion that modern constitutional cases involving legislative reapportionment, school desegregation, criminal procedure, or first amendment issues are somehow rooted (however tenuously) in the original understanding . . . of the fourteenth amendment." Perry, *supra* note 63, at 688. Although Professor John Burleigh disagrees with my view of the Court's role, he stated that my book "not only raises all the right questions, but it is also carefully documented and rigorously argued, at once learned, illuminating, and challenging." Burleigh, *The Supreme Court and the Constitution*, THE PUBLIC INTEREST 151, 152-53 (Special Winter Supplement, 1978).

"Berger's uncomfortable and unfashionable analysis is an important one. It will not do, as some have already done, to brush it aside in a peremptory manner." Monaghan, *The Constitution Goes to Harvard*, 13 HARV. C. R. — C. L. REV. 117, 124 (1978). "Berger's careful scouring of the record and his incisive critique of what he regards as misuse of that record by others seriously undermines the conventional wisdom concerning the intent of the Fourteenth." Kommers, *Role of the Supreme Court*, 40 REV. OF POL. 409, 413 (1978). There are other similar expressions which contradict Brest's ill-considered charge that Berger "distorted" the record. On the key issues of segregation and suffrage he is now in accord.

213. Brest, *supra* note 54, at 44, col. 3.

214. R. BERGER, *supra* note 29, at 69-84, 419-27, 117-33.

215. Brest, *supra* note 54, at 44, col. 1.

216. Brest, *supra* note 1, at 231. He hedges disingenuously: "if the adopters had any intention at all" respecting "discrimination in the political process," notwithstanding he concedes that suffrage was outside the Framers' contemplation. *Id.*

documentation has gradually infiltrated his thinking, but he has not the grace to confess error, even though on his theory that the Constitution is not binding that error is immaterial.

Candor also required him to notice, in rejecting "Berger's major premise, that constitutional interpretation should depend chiefly on the intent of those who framed and adopted a provision,"<sup>217</sup> that his "beloved mentor," Justice Harlan, held that "[w]hen the Court *disregards the express intent* and understanding of the Framers, it has invaded the realm of the political process to which the amending power was committed, and it has violated the constitutional structure which it is its highest duty to protect."<sup>218</sup> My point is not that this should be conclusive, but rather that I am not to be besmirched for agreeing with Justice Harlan.

A final example of Brest's distorted vision. I had written:

It would . . . be utterly unrealistic and probably impossible to undo the past in the face of the expectations that the segregation decisions, for example, have aroused in our black citizenry . . . . That is more than the courts should undertake and more, I believe, than the American people would desire. But to accept thus far accomplished ends is not to condone the continued employment of the unlawful means . . . . [T]he difficulty of a rollback cannot excuse the *continuation* of such unconstitutional practices . . . .<sup>219</sup>

Brest regards this as an expression of regret

that the erroneous doctrine ever came into existence . . . as a burden that must be borne because of the . . . infidelities of her <sup>[220]</sup> [my] predecessors. Even if she acknowledges the doctrine, she must not encourage its growth or even strive officially [?] to sustain it. The originalist program of dealing with an illegitimate doctrine is one of minimum maintenance and, if possible, gradual death.<sup>221</sup>

217. Brest, *supra* note 54, at 44, col. 1.

218. *Oregon v. Mitchell*, 400 U.S. 112, 203 (1970) (Harlan, J., dissenting) (emphasis added).

219. Brest, *supra* note 1, at 232 n.108 (quoting R. BERGER, *supra* note 29, at 412-413.).

220. It is an index of Brest's doctrinaire commitment to reverse discrimination that, in the face of a tradition spanning several millenia of referring to interpreters as "he," Brest should replace the masculine by "she." He might at least have given men equal billing: he/she.

221. Brest, *supra* note 1, at note 108.

Manifestly this twists my words: I did not suggest that the "burden" must "be borne because of the infidelities of her predecessors," but concluded rather that *events*, like poured concrete, had hardened so that overruling *Brown v. Board* could not restore the *status quo ante*. Nor did I thereby "acknowledge" the doctrine, or seek to "maintain" it but, recognizing that the situation it had created could not be unfrozen, I said "Go and sin no more." For Brest this is a "sort of statute of limitations,"<sup>222</sup> but as the Supreme Court declared, "[t]he past cannot always be erased by a new judicial declaration."<sup>223</sup> All the more this is true when the past cannot be unrolled, when to apply an unconstitutional doctrine in ever expanding fashion, for example, to insist on court-administered schools and reverse discrimination, is to compound the initial offense.

This by no means exhausts the catalog of Brest's distortions and misrepresentations, but it should suffice to show that he is either unwilling or unable to accept unpalatable facts, a prime requisite of scholarly inquiry.

### Conclusion

Unlike some of his activist brethren, who still seek to root the Court's contra-constitutional decrees in the Constitution — "open-ended terms," an "invitation" to import extra-constitutional considerations — Brest boldly strikes the shackles of the Constitution:<sup>224</sup> it is not binding on judges or other public officials. Like Samson he brings down the pillars of the temple, for on his theory judicial decrees are no more

222. *Id.*

223. *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374 (1940). Chief Justice Marshall stated: "The past cannot be recalled by the most absolute power." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 122 (1810). *Linkletter v. Walker*, 381 U.S. 618, 625-29 (1965) held that courts are empowered "to make law effective for the future only."

224. For the Founders:

[Government] must be limited in many ways; it must be checked at every possible point; it must be at all times under suspicion. . . . Too much emphasis cannot well be laid upon the fear which the 'Fathers' had of government. To them the great lesson of history was, that government always tends to become oppressive, and that it was the greatest foe of individual liberty.

C. MERRIAM, *AMERICAN POLITICAL THEORIES* 77 (1906). The colonists were haunted by the aggressiveness of power, "its endlessly propulsive tendency to expand itself beyond legitimate boundaries." B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 56-57 (1967). Hence, as Jefferson explained, "limited constitutions" were designed "to bind down those whom we are obliged to trust with power," to "bind [them] down from mischief by the chains of the Constitution." 4 J. ELLIOT, *DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 543 (1836). A veteran British political scientist, Professor Max Beloff, concluded, "It is better so." Beloff, *Arbiters of American Destiny*, *THE TIMES HIGHER EDUCATION SUPP.* II, April 7, 1978, London.

binding than the Constitution which gives them life. He tacitly confesses that the Constitution does not authorize the Court to impose its extra-constitutional values on the people, but justifies on the ground that judges have been doing so and are especially "competent" to discover and apply "fundamental values." It betrays the poverty of the activist cause that a leading spokesman should maintain that expertise confers power, that courts may thrust aside constitutional limitations because they have decided they are most qualified to govern, a transparent apology for an imperial judiciary. Nevertheless, Brest performs a service in underlining the central issue: where is the Court empowered to reverse the Framers' determinations? Exaltation of courts over Constitution is a tenet of the "New Faith";<sup>225</sup> but as Justice, then Professor Hans Linde, wrote, the "whole enterprise of constitutional law rests, after all, on the premise that the nation cares about its Constitution, not about its courts."<sup>226</sup> Let but the people realize that they are the victims of a silent "revolution"<sup>227</sup> that has deprived them of self-government, and government by judiciary will come to a jarring halt.

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225. An activist apostle, Professor Stanley Kutler, wrote that prior to 1937 academe "accused judges [of] . . . arrogat[ing] a policy-making function not conferred upon them by the Constitution," which negated the basic principles of representative government. Thereafter most of the judiciary's longtime critics suddenly found a "new faith," matching a "new libertarianism" with an "activist judiciary to protect those values." Kutler, *supra* note 22, at 512-13.

226. Linde, *Judges, Critics and the Realist Tradition*, 82 YALE L.J. 227, 256 (1972).

227. Kelly, *supra* note 22, at 158: the Warren Court was "[determined] to carry through a constitutional equalitarian revolution. . . ." See also Kutler, *supra* note 22.